No. 98-1161-CSX Title: City of Erie, et al., Petitioners
v.
Pap's A.M., tdba "Kandyland"

Docketed: January 21, 1999 Court: Supreme Court of Pennsylvania, Western District

See also:
98-994

Entry	Date	Proceedings and Orders
	Jan 19 1999	Petition for writ of certiorari filed. (Response due April 15, 1999)
	Feb 11 1999	Waiver of right of respondent Pap's A.M. to respond filed.
	Feb 17 1999	DISTRIBUTED. March 5, 1999
	Feb 18 1999	Motion of Erie County Citizen's Coalition Against Violent Pornography for leave to file a brief as amicus curiae filed.
	Mar 2 1999	Response requested.
	Mar 17 1999	Order extending time to file response to petition until April 15, 1999.
	Apr 12 1999	Brief of respondent Pap's A.M. in opposition filed.
	Apr 27 1999	REDISTRIBUTED. May 13, 1999
	May 17 1999	Motion of Erie County Citizen's Coalition Against Violent Pornography for leave to file a brief as amicus curiae GRANTED.
	May 17 1999	Petition GRANTED. SET FOR ARGUMENT November 10, 1999.
		**********
	Jun 1 1999	Order extending time to file brief of petitioner on the merits until August 16, 1999.
	Jun 4 1999	Motion of respondent to dismiss the writ of certiorari as moot filed.
	Jun 11 1999	Opposition of petitioners to motion of respondent filed.
	Jun 18 1999	Reply brief of respondent filed.
	Jun 21 1999	DISTRIBUTED. June 24, 1999 (Page 13)
	Jun 24 1999	Motion of respondent to dismiss the writ of certiorari as moot DENIED.
	Jul 1 1999	Motion of Erie County Citizen's Coalition Against Violent Pornography for leave to file a brief as amicus curiae filed.
	Jul 2 1999	Order extending time to file respondent's brief on the merits to and including September 30, 1999.
	Aug 4 1999	Brief amici curiae of Morality in Media, Inc., et al. filed.
	Aug 13 1999	Brief amicus curiae of National Family Legal Foundation filed.
	Aug 16 1999	Joint appendix filed.
	Aug 16 1999	Brief of petitioners City of Erie, Pennsylvania, et al. filed.
	Aug 16 1999	Motion of American Liberties Institute, et al., for leave to file a brief as amici curiae filed.
	Aug 16 1999	Brief amicus curiae of Brevard County, Florida filed.
	Aug 18 1999	Brief amici curiae of Kansas, et al. filed.
	Aug 30 1999	Motion of Orange County, Florida, for leave to file a

2 pp

No. 98-1161-CSX

Entry	Date	Proceedings and Orders
		brief as amicus curiae filed.
	Sep 1 1999	Record filed.
	Sep 13 1999	Letter and status report on Issue of Mootness submitted by counsel for the respondent and distributed.
	Sep 29 1999	Motion of Kansas and Ohio for leave to participate in oral argument as amici curiae and for divided argument filed.
	Sep 30 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Sep 30 1999	Brief amicus curiae of Feminists for Free Expression filed.
	Sep 30 1999	Brief amici curiae of Deja Vu Consulting, Inc., et al. filed.
	Sep 30 1999	Motion of Bill Conte, et al. for leave to file a brief as amici curiae filed.
	Sep 30 1999	Brief amici curiae of T. Jefferson Cntr. for Protection of Free Expression, et al. filed.
	Sep 30 1999	Brief of respondent Pap's A.M., t/d/b/a Kandyland filed.
	Sep 30 1999	Brief amicus curiae of Frist Amendment Lawyers Association filed.
	Sep 30 1999	Brief amicus curiae of American Association for Nude Recreation filed.
	Oct 1 1999	CIRCULATED.
	Oct 4 1999	Motion of Erie County Citizen's Coalition Against Violent Pornography for leave to file a brief as amicus curiae GRANTED.
	Oct 4 1999	Motion of American Liberties Institute, et al., for leave to file a brief as amici curiae GRANTED.
	Oct 4 1999	Motion of Orange County, Florida, for leave to file a brief as amicus curiae GRANTED.
	Oct 14 1999	Motion of Bill Conte, et al. for leave to file a brief as amici curiae DISTRIBUTED (October 15, 1999).
	Oct 15 1999	Letter from counsel for the respondent received and distributed.
	Oct 18 1999	Motion of Bill Conte, et al. for leave to file a brief as amici curiae GRANTED.
	Oct 28 1999	Motion of Kansas and Ohio for leave to participate in oral argument as amici curiae and for divided argument DISTRIBUTED (October 29, 1999).
	Nov 1 1999	Motion of Kansas and Ohio for leave to participate in oral argument as amici curiae and for divided argument DENIED.
	Nov 1 1999	Reply brief of petitioners City of Erie, Pennsylvania, et al. filed.
	Nov 10 1999	ARGUED.

(1)

Supreme Court, U.S.
FILED

9811 61 JAN 19 1999

OFFICE OF THE CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

v.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of Pennsylvania, the court of last resort of the Commonwealth of Pennsylvania, improperly strike an ordinance of the City of Erie which fully comports with the principles articulated in *Barnes v. Glen Theatre, Inc.*, thereby willfully disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the Constitution of the United States?

PARTIES

All parties to the proceeding before the Supreme Court of Pennsylvania are parties to this petition.

Appellants: The City of Erie, a municipal corporation organized under the provisions of the Third Class City Code of the Commonwealth of Pennsylvania, maintaining its principal place of business at 626 State Street, Erie, Pennsylvania, its mayor and named present and former members of City Council

Appellee: Pap's A.M., a Pennsylvania corporation trading and doing business as "Kandyland," maintaining its principal place of business at 4004 Peach Street, Erie, Pennsylvania

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,
PETITIONERS

v.

PAP'S A.M., T/D/B/A KANDYLAND,
RESPONDENT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in *Pap's A.M. t/d/b/a Kandyland v. The City of Erie, Pennsylvania, et al.*, __ Pa. __, 719 A.2d 273 (1998).

OPINIONS AND ORDERS BELOW

The opinion of the Court of Common Pleas of Erie County, Pennsylvania denying Pap's A.M.'s request for preliminary injunction, with accompanying order, is reported at 78 Erie 6 (January 13, 1995), and is reproduced at Appendix B to this petition. The opinion of the Court of Common Pleas of Erie County, Pennsylvania granting a permanent injunction and declaring Ordinance 75-1994 unconstitutional, with accompanying order, is reported at 78 Erie 17 (January 27, 1995), and is reproduced at Appendix C to this petition.

The opinion of the Commonwealth Court of Pennsylvania with accompanying order is reported at 674 A.2d 338 (1996) and is reproduced at Appendix D to this petition. The order of the Supreme Court of Pennsylvania granting limited review of the decision of the Commonwealth Court is reported at 547 Pa. 9, 688 A.2d 168 (1997) and is reproduced at Appendix E to this petition.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania and concurring opinion are reported at ___ Pa. ___, 719 A.2d 273 (1998) and are reproduced at Appendix F to this petition.

JURISDICTION

The Supreme Court of Pennsylvania, the highest court of the Commonwealth, rendered its opinion and order on October 21, 1998.

Jurisdiction is vested in the United States Supreme Court by 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988), as the validity of a municipal enactment is questioned as repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, which provides that

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Supremacy Clause of the Constitution of the United States of America, which provides that

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

STATEMENT OF THE CASE

This action originated as a Complaint in Equity before the Court of Common Pleas of Erie County, Pennsylvania, filed October 14, 1994. The complaint named as defendants The City of Erie, Pennsylvania, its mayor Joyce A. Savocchio, and five members then seated on the City Council. Plaintiff below Pap's A.M. identified itself as a Pennsylvania corporation maintaining a place of business within the City of Erie, and described its business as "an establishment which provides nude dancing." [Complaint in Equity, Appendix A at 1a, 3a].

Pap's A.M., or "Kandyland," sought to enjoin enforcement of City of Erie Ordinance 75-1994, along with a declaration that the ordinance is invalid and unenforceable.

Kandyland further sought to enjoin the City of Erie from enacting similar legislation in the future. [Appendix A at 4a]. In a second count, Kandyland purported to bring an action under 42 U.S.C.S. § 1988, seeking damages, counsel fees and costs of litigation. [Appendix A at 4a-5a].

The challenged ordinance was enacted by a majority vote of City Council on September 28, 1994 and was signed into law by Mayor Savocchio on September 30, 1994. The ordinance replaced an 1866 version of Article 711 of the Codified Ordinances of the City of Erie, titled *Indecency and Immorality*, and replaced it with a new article titled *Public Indecency*.[1] The text of Ordinance 75-1994 was closely modeled on the text of the ordinance reviewed in *Barnes v. Glen Theatre, Inc.*[2]

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[1] The new Article 711 provides that a person commits a summary offense by doing any of the following acts knowingly and intentionally in a public place:

a. engaging in sexual intercourse
b.– engaging in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
c. appearing in a state of nudity
d. fondling his/her own genitals or the genitals of another person

"Nudity" and "public place" are defined terms. Children under ten years of age and women breastfeeding infants are excepted from the scope of the ordinance. [Ordinance 75-1994, appended to the Complaint, Appendix A at 8a-9a].

[2] 501 U.S. 560 (1991)

Kandyland's complaint challenged the ordinance on federal and state constitutional grounds. Kandyland averred that the ordinance violates the freedoms of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, § 7 of the Constitution of the Commonwealth of Pennsylvania; that the working of the ordinance constitutes a taking under both the United States and Pennsylvania Constitutions; that the ordinance violates the right to the equal protection of the laws guaranteed by the United States and the Pennsylvania Constitution; that the ordinance is overbroad; and that the ordinance is pre-empted by the laws of the Commonwealth of Pennsylvania. [Appendix A at 3a-4a].

The Court of Common Pleas denied Kandyland's petition for preliminary injunction by Order issued October 21, 1994. [Appendix B at 19a]. Following a hearing on December 21, 1994, a permanent injunction was granted. The trial court's Opinion and Order of January 18, 1995, declared Ordinance 75-1994 unconstitutional. [Appendix C at 20a-40a].

The City took an appeal as of right to the Commonwealth Court of Pennsylvania, the appropriate intermediate appellate court. Kandyland cross-appealed seeking counsel fees which had been denied by the lower court. The City challenged the lower court's declaration of constitutional invalidity and challenged Kandyland's standing to bring a claim under the First Amendment. The City further took issue with the lower court's failure to place a limiting construction on the ordinance.[3]

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[3] Challenges were also brought on the issue of state law pre-emption of the ordinance and to the trial court's failure to rule on immunity issues.

The Commonwealth Court's opinion and order issued on March 27, 1996. That court analyzed the *Barnes* decision under the framework set forth in *Marks v. United States* and concluded that Mr. Justice Souter's opinion articulates the holding of *Barnes*.[4] The Commonwealth Court interpreted the *Barnes* decision as holding that "an ordinance regulating speech can survive scrutiny if it satisfies the test in *O'Brien*, and is designed to prevent secondary effects associated with adult entertainment."[5] Having so stated the rule of law, the Commonwealth Court concluded that Ordinance 75-1994 does not violate rights guaranteed to Kandyland by the First Amendment.[6]

Turning to the overbreadth issue, the Commonwealth Court examined the Sixth Circuit's opinion in *Triplett Grille*. The court noted the obligation of a state court interpreting a state statute to construe the statute to avoid constitutional

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4 When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments in the narrowest grounds.'. . . Applying the *Marks* rule, Justice Souter's opinion articulates the holding of the Court since it shares with the majority of the Justices a common underlying approach and, since Justice Souter ruled on the narrowest ground, his concurrence therefore is the law."

Pap's A.M. v. City of Erie, 674 A.2d 338, 343 (Pa. Commw. 1996)[citations omitted].

5 674 A.2d at 343, citing *Barnes*, *United States v. O'Brien*, 391 U.S. 367 (1968) and *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994).

6 674 A.2d at 344.

problems where the statute as drafted is amenable to a limiting construction.[7] The Commonwealth Court expressly interpreted and limited the ordinance to reach conduct, not expression, and held that the ordinance is not facially overbroad.[8]

The Supreme Court of Pennsylvania granted review limited to two issues: whether Ordinance 75-1994 violates the rights to free speech and expression guaranteed by the Constitutions of the United States and of Pennsylvania, and whether the ordinance is fatally overbroad.[9] The court heard argument on September 16, 1997 and rendered its opinion on October 21, 1998. At the time of argument the Pennsylvania Supreme Court had only six justices seated. Madame Justice Newman did not participate in this decision. Accordingly, only five justices heard and decided the appeal. Three justices joined in the opinion of the court; two joined in a concurring opinion.

The Pennsylvania court cited a majority in *Barnes* as holding that nude dancing is an expressive act entitled to "some quantum of protection under the First Amendment."[10] From there, however, the Pennsylvania court freely departs from and disregards *Barnes*. Characterizing the opinion as "hopelessly fragmented," a "hodgepodge of opinions," the Pennsylvania court made fleeting reference to this Court's

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7 674 A.2d at 346, citing *New York v. Ferber*, 458 U.S. 747 (1982).

8 *Id.* at 346.

9 *Pap's A.M. v. City of Erie*, 688 A.2d 168 (1997)

10 *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276 (Pa. 1998).

decision in *Marks v. United States* before determining that the *Marks* analysis does not afford binding precedential value to any opinion in *Barnes*.[11]

The Pennsylvania court thus "determined that there is no United States Supreme Court precedent which is squarely on point," in knowing disregard of *Barnes*. The court then undertook *de novo* analysis of the ordinance.[12]

The Pennsylvania court rejected the argument that Ordinance 75-1994 is content-neutral. On that basis, the court went on to apply strict scrutiny analysis, as is appropriate for a content-based enactment. The Pennsylvania court found a compelling governmental interest in deterring sex crimes. The ordinance failed, nonetheless, on the court's holding that it is not narrowly tailored to meet the compelling interest.[13] The court declined to "re-draft the ordinance" by subjecting it to a limiting construction. Rather, the court struck the portions prohibiting public nudity.[14]

The Pennsylvania court described Ordinance 75-1994 as "strikingly similar" to the Indiana statute at issue in *Barnes*.[15] The original *Barnes* ordinance, under the limiting construction imposed by the Supreme Court of Indiana, was upheld by this Honorable Court. No attempt was made to

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11 719 A.2d at 278.

12 *Id.*

13 *Id.* at 279-280.

14 *Id.* at 280-281.

15 *Id.* at 277.

distinguish *Barnes*; rather, the Pennsylvania court refused to acknowledge *Barnes* as binding precedent.

The Pennsylvania court could have interpreted the Pennsylvania constitution as giving more protection to the expressive conduct at issue than does the United States Constitution. The court did not do so. To the contrary, the court decided a First Amendment question in a fashion directly contrary to relevant precedent of this Honorable Court. The Pennsylvania Supreme Court has thus committed manifest reversible error by knowingly disregarding the precedent of *Barnes v. Glen Theatre*.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Pennsylvania decided the "Kandyland" case in derogation both of the principle of federalism as stated by the Supremacy Clause and of the doctrine of *stare decisis*. The Pennsylvania court granted limited review of the intermediate appellate court's decision. The nature of the controversy is plainly stated by that court's Order of January 28, 1997:

> I. Whether the Erie City Ordinance is unconstitutionally overbroad.
>
> III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the Pennsylvania Constitution.[16]

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16 688 A.2d 168 (1997).

The ordinance prohibited four specific acts. Kandyland challenged only the prohibition of appearing in a public place in a state of nudity.

The Pennsylvania court began its analysis by stating a rule of law properly derived from this Honorable Court's decision in *Barnes v. Glen Theatre*. The court cited *Barnes* for the proposition that nude dancing is expressive conduct and, as such, enjoys a measure of protection under the First Amendment.[17] From there, however, the Pennsylvania court declined to "cobble together a holding out of a fragmented decision."[18] It is from that point in the opinion that the Pennsylvania court throws over the well-settled doctrine of *Marks v. United States* and goes on to discard *Barnes*.

After dismissing *Barnes* as at best "instructive,"[19] the Pennsylvania court grounds its decision firmly on the *Barnes* dissent. Justice White dissented in *Barnes* on the basis of his conclusion that the *Barnes* ordinance is not-content neutral.[20] The Pennsylvania court opined that Ordinance 75-1994, modeled on the *Barnes* ordinance, is also content-based. Accordingly, the Pennsylvania court went on to analyze Ordinance 75-1994 under strict scrutiny. The court correctly stated the standard for strict scrutiny, and then again looked to the dissent in *Barnes* to find that Ordinance 75-1994 is not narrowly tailored to meet the conceded compelling governmental interest. The Pennsylvania court provided

17 719 A.2d at 276.

18 *Id.* at 278.

19 *Id.* at 278.

20 501 U.S. at 592.

samples of restrictions which it would view as content-neutral and therefore not subject to strict scrutiny, again from the *Barnes* dissent.[21]

The Pennsylvania court committed fundamental error by analyzing Ordinance 75-1994 under strict scrutiny. It is well settled that expressive conduct is not entitled to full First Amendment protection. Where the conduct has both speech and non-speech elements, incidental limitations on First Amendment freedoms may be tolerated. *United States v. O'Brien*[22] provides the correct analytical framework. The *O'Brien* test permits some burden on expressive conduct where the burden is justified by a "sufficiently important governmental interest."[23]

The Pennsylvania court expended its efforts solely on disagreeing with the result in *Barnes*. This Honorable Court has previously addressed the respective roles of state and lower federal courts in federal constitutional analysis.

> While the construction that a state court gives a state statute is not a matter subject to our review . . . this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents,

21 719 A.2d at 279-280.

22 391 U.S. 367 (1968).

23 391 U.S. at 376-377.

> as well as state court decisions giving the Constitution too little shrift.[24]

Reasonable people may respectfully disagree with the plurality in *Barnes*, and wholeheartedly embrace the strictest construction of the First Amendment. The City of Erie, in enacting Ordinance 75-1994, made a strong statement of deference to "the fundamental constitutional guarantees of free speech and free expression."[25] The ordinance was passed in reliance on the result of *Barnes*, upholding the restriction on total nudity in a public place. The result of *Barnes* is clearly the subject of thoughtful and serious disagreement.

Nonetheless, disagreement with the outcome of a case does not give a lower court license to disregard it. The Court of Appeals for the Third Circuit has been required to apply the *Marks* analysis in a different context. The Circuit Court wrote

> The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent.[26]

The Third Circuit went on to cite the Court of Appeals for the D.C. Circuit for the proposition that some Supreme Court

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[24] *New York v. Ferber*, 458 U.S. 747, 767 (1982).

[25] Ordinance 75-1994, Appendix A at 7a.

[26] *Rappa v. New Castle County*, 18 F.3d 1043 (1994), quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991).

decisions simply will not yield a controlling principle.[27]

The Pennsylvania Supreme Court undertook a reasoning process closely parallel to that of the D.C. Circuit, which was embraced by the Third Circuit in its analysis of *Metromedia, Inc. v. San Diego*[28] in *Rappa*. The Third Circuit described *Metromedia* as "a badly splintered plurality opinion which has arguably been undermined by the recent decision in *Cincinnati v. Discovery Network*."[29] Still, notwithstanding the frailty of *Metromedia* as precedent, the Third Circuit held that it was bound by *Metromedia*'s result.

The Third Circuit determined that if the legislation in question in *Rappa* was substantially the same as the ordinance in *Metromedia*, the Circuit was required to treat it in the same fashion as the *Metromedia* ordinance and strike it down.[30] It is at that point that the Pennsylvania court also parts company with the Third Circuit. The Circuit went on to distinguish the subject provision from that in *Metromedia*. The Pennsylvania court freely acknowledged the "striking similarity" between Indiana's statute and the City of Erie's Ordinance 75-1994. It simply chose to act upon its disagreement with the result in *Barnes* by striking the salient portions of Erie's ordinance.

In a matter of federal constitutional analysis, the

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[27] *Rappa* at 1058, quoting *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991)(*en banc*).

[28] 453 U.S. 490 (1981)

[29] *Rappa* at 1047.

[30] *Rappa* at 1061.

Pennsylvania Supreme Court stands in no different position than do the Circuit courts. If the Pennsylvania court declares itself unbound by a directly relevant decision of the United States Supreme Court on a federal question, then there is no order or predictability in the law. A court may on occasion be compelled to rule against the personal preferences or even the deeply-held convictions of its justices. The three judges who here comprised a majority of the Pennsylvania Supreme Court may disagree with *Barnes*. They may find nothing whatsoever objectionable about fully-nude barroom performances, or may be appalled by them but hold the First Amendment dear. Personal values or opinions are not, however, a proper basis for a judicial determination. Our courts are bound by precedent, whether that precedent is agreeable to the jurists or not. Indeed, the concurring opinion of the Pennsylvania Supreme Court voiced discomfort with the majority's analysis and result.

> [B]ecause a majority of the United States Supreme Court has upheld the constitutionality of a virtually identical ordinance under the First Amendment to the Federal Constitution, and because this Court is bound by the United States Supreme Court's interpretations of the Federal Constitution, I must disagree with the majority's conclusion that the provisions of the ordinance at issue fail under the First Amendment to the Federal Constitution.[31]
>
> . . . .
>
> I believe the majority herein strains to find discord in *Barnes* where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent.[32]

Justice O'Connor's discussion of the doctrine of *stare decisis* sets a high standard, placing the burden of the very legitimacy of the judicial system on "legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[33]

The Pennsylvania Supreme Court also labors under that burden. If indeed the *Barnes* decision is improvident, or has left the lower courts grasping for guidance which is elusive under *Barnes*, it is for this Honorable Court to impose the needed clarity.

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[31] 719 A.2d 273 at 281.

[32] *Id.* at 282.

[33] *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992).

CONCLUSION

For the foregoing reasons, Petitioners request that this Honorable Court grant this petition for certiorari, and either remand this case for reconsideration under the binding precedent of *Barnes v. Glen Theatre, Inc.* or set the case for briefing and argument.

Respectfully submitted,

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JANUARY 1999

APPENDICES

APPENDIX A

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

COMPLAINT IN EQUITY

AND NOW, comes the above-named plaintiff, PAP'S A.M. t/d/b/a KANDYLAND, by their attorneys, AMBROSE, FRIEDMAN and WEICHLER, and files the following as their complaint:

I. COUNT ONE

PAP'S A.M. t/d/b/a KANDYLAND v. THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities

1. The plaintiff, Pap's A.M., is a Pennsylvania Corporation trading and doing business as Kandyland with its principal place of business located at 1402 State Street, Erie, Pennsylvania 16501.

2. The defendant City of Erie is a Third Class City incorporated under the laws of the Commonwealth of Pennsylvania with offices located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

3. The defendant Joyce A. Savocchio is the mayor of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

4. The defendant Chris E. Maras is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

5. The defendant Mario S. Bagnoni is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

6. The defendant Robert C. Brabender is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

7. The defendant Denise Robison is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

8. The defendant James N. Thompson is a member of City Council of the City of Erie whose office is located at City Hall, 626 State Street, Erie, Pennsylvania 16501.

9. On or about September 28, 1994 City Council passed Ordinance No. 75-1994 by a vote of 7-2. Each of the above-named defendant members of council voted in favor of the ordinance.

10. On or about September 30, 1994 the ordinance was approved by the defendant Mayor Joyce A. Savocchio. A copy of the ordinance is attached hereto as Exhibit A.

11. The plaintiff maintains an establishment which provides nude dancing within the requirements of the laws of the Commonwealth. The plaintiff does not serve alcoholic beverages on its premises. The ordinance which has been adopted and which is scheduled to become effective on October 20, 1994 will prevent the plaintiff and its employees from exercising their rights under the First Amendment to the United States Constitution and Article I Section 7 of the Pennsylvania Constitution and will furthermore preclude the plaintiff's patrons from viewing protected speech. The ordinance will furthermore cause the plaintiff to either close its business or suffer severe economic consequences.

12. The plaintiff avers that the ordinance is unconstitutional and illegal and should be invalidated for the following reasons:

a.) The ordinance violates the First and Fourteenth Amendments to the United States Constitution which guarantee freedom of expression;

b.) The ordinance violates Article 1 Section 7 of the Pennsylvania Constitution which guarantees freedom of expression;

c.) The ordinance is substantially overbroad;

d.) The ordinance violates the laws of the Commonwealth of Pennsylvania in that state law preempts the ordinance;

e.) The ordinance constitutes a taking of the plaintiff's property without just compensation in violation of the Pennsylvania and United States Constitutions;

(note: there is no f.) in the original document)

g.) The ordinance and its purported enforcement violates the plaintiff's right to equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 26 of the Pennsylvania Constitution.

WHEREFORE, the plaintiff respectfully requests that this Court enter a declaratory judgment declaring the ordinance unconstitutional, illegal and unenforceable. The plaintiff further requests that the Court enjoin the defendants from enforcing said ordinance and furthermore from passing and/or enforcing similar ordinances which are in violation of the United States and Pennsylvania Constitutions and the laws of this Commonwealth. The plaintiff further requests that this Court grant any other relief which this Court deems just and appropriate.

COUNT II.

PAP'S A.M. t/d/b/a KANDYLAND v. CITY OF ERIE

1. The Plaintiff hereby incorporates by reference numbers 1 through 11 above as though fully set forth herein.

2. The defendant City of Erie through its officials

is acting under color of state law in enacting and enforcing Ordinance 75-1994.

3. The actions of the City of Erie violate the constitutional rights of the plaintiff.

4. The City of Erie is liable to the plaintiff for damages, counsel fees and expenses pursuant to 42 U.S.C. sec. 1988.

WHEREFORE, the plaintiff respectfully requests this Court to award damages in an amount in excess of $20,000.00 together with counsel fees, expenses and appropriate interest and any other relief which this Court deems just and appropriate.

Respectfully submitted,

AMBROSE, FRIEDMAN and WEICHLER

By s/Philip B. Friedman
Philip B. Friedman, Esquire
Attorney for Plaintiff
319 West 8th Street
Erie, Pennsylvania 16502-1495
814/452-3069
Supreme Court I.D. No. 27554

Dated: 10/19/94

EXHIBIT "A", COMPLAINT IN EQUITY

CITY COUNCIL OF ERIE

INTRODUCED BY: MR. THOMPSON

COUNCIL FILE NO. 14,482
OFFICIAL ORDINANCE NO. 75-1994

AN ORDINANCE

Amending Article 7 of the Codified Ordinances of the City of Erie (General Offenses) by repealing the present Article 711 - Indecency and Immorality, and substituting a new Article 711 to be titled Public Indecency, prohibiting certain conduct in public places, providing definitions relating thereto, and providing penalties for the violators thereof, including fines, imprisonment, and declaration of public nuisance, as appropriate.

WHEREAS the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity; and

WHEREAS, Council, by various enactments of General Offenses of Article 711 and 112, as well as amendments to the Zoning Ordinance, has expressed its intention to limit or restrict such lewd immoral activities, to

provide penalties for violations thereto and, in appropriate cases to declare the locations of such activities to be a public nuisance subject to abatement; and

WHEREAS, Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare; and

WHEREAS, over the years, various statutes and court interpretations have been enacted and decided, which compel periodic re-evaluation and revision of City ordinances and regulations; and

WHEREAS, the current Article 711, Indecency and Immorality, the provisions of which date back as far as the year 1866, is outdated in part and unnecessary in part, and should be entirely replaced with new language consistent with current state and federal law; and

WHEREAS, Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in Barnes vs. Glen Theatre Inc., et al 111 Sup. Ct. 2456 (1991), for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:

Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:

1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquets (sic) halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a

court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all Ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

We do hereby certify that the above ordinance was finally passed by the City Council on September 28, 1994.

SIGNED September 28, 1994

Attest: September 28, 1994

Chris E. Maras
President of Council

James Klemm
City Clerk

THIS ORDINANCE APPROVED THIS 30th DAY OF September, 1994.

Joyce A. Savocchio
Mayor

APPENDIX B

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

Appearances: Philip B. Friedman, Esquire, for Plaintiff
Gregory A. Karle, Esquire/Gerald J. Villella, Esquire, for Defendants

OPINION

Levin, J.

This matter is before the court on Pap's A.M. t/d/b/a Kandyland's (hereinafter referred to as "Kandyland") request for a preliminary injunction requesting the court to enjoin defendants from enforcing an ordinance passed by the Erie City Council on September 30, 1994. The relevant facts surrounding the issue have been agreed upon by the parties. Namely, Pap's A.M. is the owner of a business named

Kandyland. The business is located within the city limits in a commercial area. Kandyland provides adult entertainment to its patrons in the form of nude dancing. Alcoholic beverages are not served on the premises; however, patrons are allowed and are invited to bring alcohol into the establishment.

On September 28, 1994, the City Council enacted Ordinance No. 75-1994.[1] In relevant part, the ordinance reads:

> 1. A person who knowingly or intentionally, in a public place:
>
> a. engages in sexual intercourse
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
>
> c. appears in a state of nudity, or
>
> d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.
>
> 2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any

[1] There are no allegations that the City Council failed to abide by 53 P.S. §36001, et seq. in the passage of Ordinance 75-1994.

> part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
>
> 3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.
>
> 4. The prohibition set forth in subsection 1(c) shall not apply to:
>
> a. Any child under ten (10) years of age; or
>
> b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.
>
> 5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used

> for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

The ordinance was signed by Mayor Savocchio on September 30, 1994, and is scheduled to take effect on October 20, 1994. On October 14, 1994, Kandyland filed a complaint in equity against the defendants. Shortly thereafter, on October 17, 1994, plaintiff filed for a preliminary injunction. Argument was held regarding the preliminary injunction on October 19, 1994, and this court temporarily enjoined the defendants from enforcing Ordinance 75-1994 pending its decision on the instant request for a preliminary injunction.

When determining whether a preliminary injunction should be granted, the court must consider the following standard: (1) is the injunction necessary to prevent immediate and irreparable harm not compensable in damages; (2) would greater harm result from denying the injunction than from granting it; (3) is the plaintiff's right to relief clear (a likelihood of success on the merits); and (4) will the status quo be restored if the injunction is granted. Com. v. Danny's Bookstore, 155 Pa. Cmwlth. 281, 625 A.2d 119 (1993) citing Norwood A. McDaniel Agency v. Foster, 117 Pa. Cmwlth. 227, 543 A.2d 155 (1988).

First, before a preliminary injunction can be entered, the plaintiff must show that such injunction is necessary to prevent immediate and irreparable harm not compensable in damages. Kandyland's argument, and one which the court

accepts, rests on the principle that nude dancing is afforded constitutional protection under the First Amendment to the U.S. Constitution. See generally, Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993). Generally speaking, where violations of constitutional rights are alleged, a further showing of irreparable injury may not be required if more than merely money is at stake. Milwaukee County Pavers Ass'n. v. Fiedler, 707 F. Supp. 1016, as modified in 710 F. Supp. 1532 (W.D. Wis. 1989). Thus, the court finds Kandyland has met the first requirement necessary to allow entry of a preliminary injunction.

The second criteria requires that the preliminary injunction maintain the status quo. There is no doubt that issuing a preliminary injunction would satisfy this requirement for status quo would be maintained. Kandyland's business could proceed as usual, as there was no such prohibition prior to Ordinance 75-1994.[2]

The third prong to be established is whether the plaintiff's right to relief is clear, or otherwise expressed, whether plaintiff is likely to succeed on the merits of the case. This extremely high standard is required to justify the entry of a preliminary injunction, because a preliminary injunction is an extraordinary remedy and must be exercised only with extreme caution. After all the arguments presented before it, the court finds this to be the most perplexing issue to resolve. The U.S. Constitution and the Bill of Rights form the cornerstones of our government. Unfortunately,

---

[2] Ordinance 75-1994 is intended to repeal Article 711 of the Codified Ordinances of the City of Erie. Article 711 specifically addresses Houses of Ill Fame, Prostitution, Use of Vehicle for Immoral Purposes, and Obscene Writings on Wall. The recently enacted Ordinance 75-1994 addresses public indecency.

sometimes the rights afforded by the Bill of Rights are not defined with sufficient specificity. As noted by the Honorable Justice Benjamin Cardozo, "[b]ills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise." M. E. HALL, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (1947).

The Pennsylvania courts have not been directly presented with the constitutionality of ordinances as enacted in the City of Erie. The parties have cited two major cases in support of their respective positions. Not coincidentally, all the ordinances in question are almost identical to the ordinance enacted in Barnes, infra. On Kandyland's side is Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993). Triplett is currently on appeal to the Sixth Circuit. In Triplett, the District Court held that the ordinance enacted by the City of Akron was overbroad and violated the First Amendment right to free speech and expression. Further, the District Court found that the Akron ordinance failed to consider any of the secondary effects of adult entertainment in the community.

The Triplett court relied upon Justice Souter's concurring opinion in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), in finding the Akron ordinance invalid. The Triplett court interpreted Justice Souter's opinion as the narrowest grounds available in analyzing the high court's plurality opinion. See Marks v. United States, 430 U.S. 188 (1977) cited in Triplett, supra. Justice Souter's concurrence centered on the secondary effects of adult entertainment. Justice Souter found the secondary effect argument to meet the criterion set forth in United States v. O'Brien, 391 U.S. 367 (1968).

Turning to the defendants' position, the court is directed to Barnes, supra, a plurality decision of the nation's highest court. The Barnes court applied the four-part test of O'Brien, supra, and determined the Indiana statute to be constitutional. Specifically, the court stated that (a) nude dancing is expressive conduct within the outer perimeters of the First Amendment, Id. at 2460, and (b) Indiana's public indecency statute is justified despite the incidental limitations on some expressive activity. The statute was viewed as within the constitutional powers of the powers of the state and one which furthers substantial governmental interests (protecting order and morality, Barnes at 2461). Further analyzing the O'Brien test, the court ruled that governmental interest is unrelated to the suppression of free expression, since public nudity is the prohibited act (whether or not it is combined with expressive activity). Finally, the restriction placed on the First Amendment freedom was found not to be greater than essential to further the governmental interest (the act of nude dancing and the messages it intends to convey are not being deprived, but rather the messages conveyed would be slightly less graphic). Barnes at 2463.

Given these two opposing positions, this court cannot state that plaintiff's right to relief is clear or that the plaintiff is likely to succeed on the merits of the case. On the basis of Triplett, the Erie ordinance may very well be invalid. However, Ordinance 75-1994 specifically enumerates the intentions of the legislature and the purpose for its enactment, thus providing the secondary effects argument Triplett lacks. The determination that the Akron statute is overbroad is not yet final, inasmuch as Triplett has been appealed to the Sixth Circuit. Barnes, on the other hand, upheld the statute as applied.

At this time, the issues of preemption and overbreadth

are not yet ripe for review, as the court's review is strictly limited to the question of the issuance of a preliminary injunction. With the plurality decision of the U.S. Supreme Court and the conflicting District Court decision in mind, the court cannot say the plaintiff's right to relief is clear. This is not to say with certainty that upon further hearing and argument, the ordinance will be found valid. This order is being entered without prejudice to Kandyland, after a full hearing, to seek a permanent injunction. In fact, the oar Kandyland will have to pull in a final hearing to obtain an injunction is much lighter than the one they must wield in obtaining a preliminary injunction. Also, the court agrees, upon the request of either party, to expedite this case and dispose of it as soon as possible after all pleadings are filed, testimony presented and arguments held.

The court, having found that plaintiff has not met the burden with respect to proving a clear right to relief, declines to address the fourth prong of the preliminary injunction standard, that being whether greater harm would result by denying the injunction than by granting it.

Finally, the court would like to note that it has considered all the case law presented on behalf of Kandyland. These cases, however, can be distinguished from the case sub judicia, both factually and/or in the relief they seek, and thus they lend little insight in the issue of a preliminary injunction.

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

ORDER

AND NOW, to-wit, this 21 day of October, 1994, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the plaintiff's request for preliminary injunction is denied.

s/ George Levin
George Levin, Judge

NOTICE WAS GIVEN TO EACH PARTY OR COUNSEL OF RECORD BY ORDINARY MAIL ON 10-21-94.

APPENDIX C

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

Appearances: Philip B. Friedman, Esquire, for plaintiff
Gregory A. Karle, Esquire/Gerald J. Villella, Esq., for defendants

OPINION

Levin, J.

Before the court at this time is plaintiff's request for a permanent injunction enjcining the City of Erie from enforcing Ordinance 75-1994.

Findings of Fact

1. The plaintiff is Pap's A.M. t/d/b/a Kandyland (hereinafter "Pap's A.M." or "plaintiff"), with a principal

place of business located at 1402 State Street, Erie, Pennsylvania.

2. The defendants are the City of Erie, Joyce A. Savocchio, Mayor, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robinson, and James N. Thompson, all members of the City Council for the City of Erie (hereinafter "the City" or "defendants").

3. Pap's A.M. is located in a commercial area of the city and provides adult entertainment to its patrons in the form of nude dancing.

4. Pap's A.M. does not serve alcoholic beverages; however, patrons are invited to and encouraged to bring such beverages into the premises.

5. On September 28, 1994, the City Council of Erie enacted Ordinance 75-1994. The Ordinance, in relevant part, reads as follows:

> NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:
>
> Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:
>
> 1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance

halls, banquets [sic] halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the

constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

A copy of the Ordinance in its entirety is attached to and made part of this opinion as Exhibit A.

6. The ordinance was approved by Mayor Savocchio on September 30, 1994, with an effective date of October 20, 1994.

7. On October 14, 1994, Pap's A.M. filed a complaint in equity requesting the court to enter a declaratory judgment declaring the ordinance unconstitutional, illegal and unenforceable. Furthermore, Pap's A.M. requested the court to enjoin the City from enforcing Ordinance 75-1994 and from passing and/or enforcing similar ordinances.

8. On October 17, 1994, Pap's A.M. filed for a preliminary injunction. This court heard argument on the matter on October 19, 1994. At that time, the City was temporarily enjoined from enforcing Ordinance 75-1994 until such time as the court rendered its decision.

9. At the argument held October 19, 1994, Pap's A.M. presented a videotape of the City Council meeting of September 28, 1994, the meeting at which the Ordinance was passed. Various members of City Council addressed the issue and stated numerous reasons for supporting the Ordinance. Among the reasons set forth are the following:

a. The Ordinance had full support of the Mayor, the District Attorney, and the Police;

b. The Ordinance would help define and maintain community standards;

c. One night club was cited for lewd conduct by the Pennsylvania Liquor Control Board;

d. There is no right to indecency (akin to no right to gamble)

e. The ordinance would affirm the community standards as established by the City's founders;

f. Members of Council were elected to help formulate this community's standards;

g. Ordinances such as 75-1994 are not new or unlike any other community's.

h. The businesses affected by the Ordinance will stili be able to provide adult entertainment to its patrons although in a somewhat different form.

10. Upon the effective date of the Ordinance, performers of adult entertainment were required to wear "G-strings and pasties."

11. By order dated October 21, 1994, this court denied Pap's A.M.'s request for a preliminary injunction inasmuch as the court could not determine plaintiff's right to relief was clear.

12. The court convened a hearing on the permanent injunction on December 21, 1994.

13. At the final hearing held December 21, 1994, Bill Morton, a representative of the Erie Playhouse and Roadhouse Theater, was allowed to address the court (both parties agreed to allow Mr. Morton to speak before the court).

Mr. Morton spoke to the chilling effect Ordinance 75-1994 would have upon the theatrical community. He also noted that while he appreciated the City's assurances that theatrical groups were not subject to the Ordinance, the Ordinance as written imposes governmental standards in the community and is subject to variant interpretation.

14. The play "Equus," which featured frontal nudity, did appear in the City of Erie in October and November, 1994, after passage of the Ordinance.

Discussion

Before the court attempts to analyze the underlying facts of this case as they relate to the applicable law, the court would remind the parties of the purpose of this case. It is not to reveal the personal opinions of one man. If that were the case, since nude dancing does not meet with the court's approval, its task would be much easier, for the court would just concur with the City. Nevertheless, the role of this judiciary is not to question the wisdom of the actions of a legislative body. The court's responsibility is only to see that legislation passes constitutional muster. Finucan v. Pennsylvania Milk Marketing Bd., 136 Pa. Cmwlth. 272, 582 A.2d 1152 (1990).

One would hope modern society sees its judges as examining issues from all angles, balancing objectives among the various interests, applying fundamental principles neutrally, and seeking to attain a delicate balance between majority rule and the basic rights of the individual. Aharon Barak, Judicial Discretion (1989).

Initially, the court must address the City's allegation that Pap's A.M. lacks standing to challenge the Ordinance.

Traditionally, a person who is not adversely affected by the matter he seeks to challenge is not "aggrieved" and therefore has no standing to seek judicial review. American Booksellers Ass'n., Inc. v. Rendell, 332 Pa. Super. 537, 481 A.2d 919 (1984). This rule has, however, been modified for First Amendment issues. A litigant may challenge the validity of an ordinance on the grounds of overbreadth as it applies to persons not before the court. "The doctrine of overbreadth accords standing by reason of the chilling effect that a particular law might have upon the exercise of first amendment rights." Id. at 555, 481 A.2d 919 (1984). This is so because the very existence of the statute may cause others not before the court to refrain from constitutionally protected speech or expression. American Booksellers, supra, citing Broadrick v. Oklahoma, 413 U.S. 601 (1973); Doran v. Salem Inn Inc., 422 U.S. 922 (1975). Among other theories, plaintiff is challenging Ordinance 75-1994 on the basis of overbreadth. Thus, the court finds plaintiff to have standing in which to challenge the City's Ordinance. In addition, plaintiff has attained standing by the Ordinance itself. The Ordinance imposes penalties upon those who promote or maintain public indecency as a property owner, proprietor or manager of a business. Consequently, as the provider of nude adult entertainment, Pap's A.M. is aggrieved by the Ordinance upon enactment and enforcement of its provisions.

When a party challenges the constitutionality of an ordinance, he must prove the ordinance to be invalid. See, Dufour v. Maize, 358 Pa. 309, 56 A.2d 675 (1948); Patton v. Republic Steel Corp., 342 Pa. Super. 101, 492 A.2d 411 (1985). A legislative enactment enjoys a strong presumption of constitutionality and shall not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. Patten, supra, citing In the Interest of Jones,

286 Pa. Super. 574, 429 A.2d 671 (1981); Kirk v. Unemployment Compensation Board of Review, 57 Pa. Cmwlth. 92, 425 A.2d 1188 (1981); Singer v. Sheppard, 33 Pa. Cmwlth. 276, 381 A.2d 1007 (1978). Plaintiff advances three theories in support of his argument that the ordinance is invalid. These are (1) the Ordinance violates the First Amendment of both the United States and Pennsylvania Constitutions (the freedom of expression); (2) the Ordinance is preempted by 18 Pa. C.S.A. §5903, the State Obscenity Statute; and (3) the Ordinance violates the equal protection and due process clauses of the federal and state constitutions. The most pivotal argument raised by plaintiff is that the Ordinance is overbroad.

The doctrine of overbreadth serves "to invalidate legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally protected rights of free speech, press or assembly." Black's Law Dictionary, 1103 (6th ed. 1990). Although the precedential value of Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 Sup. Ct. 2456 (1991), has been highly debated in this case, both parties would agree the Barnes plurality stated nude dancing is expressive conduct within the outer perimeters of the First Amendment. Thus, it is entitled to First Amendment protection. Id. See also, Schad v. Borough of Mount Ephrain, 45 U.S. 61 (1981). The question then becomes to what degree the legislature may regulate the exercise of a constitutionally guaranteed right.

The parties have cited the court to various decisions in support of their respective positions and the court will address these in turn. In arguing that Ordinance 75-1994 is overbroad, Pap's A.M. requests the court to review Salem Inn Inc. v. Frank, 364 F.Supp. 478 E.D.N.Y., 1973 [sic], affirmed, 501 F.2d 18 (2nd Cir. 1974) affirmed in part and

reversed in part in Doran v. Salem Inn Inc., 422 U.S. 922 (1975) and Triplett Grille, Inc. v. City of Akron, No. 93-3418 (6th Cir. Nov. 1994). In Doran, the United States Supreme Court held a North Hempstead, New York, ordinance to be overbroad and in violation of the First and Fourteenth Amendments. The challenged ordinance made it unlawful for bar owners and others to permit waitresses, barmaids, and entertainers to appear in their establishment with breasts uncovered or so thinly draped as to appear uncovered. Id. at 924. The Supreme Court noted the ordinance not only applies to places which serve liquor, but to other establishments as well. The high court affirmed the grant of a preliminary injunction and adopted the District Court's finding that:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance.

Doran, 422 U.S. at 933, citing Salem Inn Inc. 364 F. Supp. at 483. After reviewing Doran, supra, it would appear the issue has clearly been decided. Unfortunately, this is not so. Doran was decided in 1975, 16 years prior to Barnes v. Glen Theatre, Inc. wherein the U.S. Supreme Court upheld an Indiana statute which provided the basis for the language in

Erie Ordinance 75-1994. In Barnes, Chief Justice Rehnquist applied the four-part test of United States v. O'Brien, 391 U.S. 367 (1968), in determining the statute to be valid, as applied.[1] The issue of overbreadth, as raised here, was not addressed by the Supreme Court in Barnes. The overbreadth argument was originally sustained in Barnes at the District Court level. Nevertheless, the Court of Appeals for the Seventh Circuit reversed this decision, citing previous litigation with respect to the statute in the Supreme Courts of Indiana and the United States as precluding such a challenge. Barnes at ____, 111 Sup. Ct. at 2459. The overbreadth doctrine has successfully been argued in Triplett Grille, Inc. v. City of Akron, No. 93-3418 (6th Cir. 1994) (hereinafter Triplett II). Although the facts giving rise to the enactment of an ordinance differ from the case at bar, the ordinances are virtually identical in what is prohibited. The Circuit Court thoroughly examined the Barnes decision and agreed with the District Court of Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249 (N.D. Ohio 1993) (hereinafter Triplett I), that Justice Souter's concurring opinion in Barnes offered the narrowest grounds upon which the decision rested. Therefore, it is this analysis which the courts must follow. Triplett II at 5.[2]

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[1] The four part test of United States v. O'Brien, supra, will uphold a government regulation if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial government interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Barnes at ____, 111 Sup. Ct. at 2461.

[2] In Marks v. United States, 430 U.S. 188 (1977), it was held that where there is no clear majority of the court, the holding of the court may be viewed as the position taken by those who concurred in the judgment

Justice Souter's opinion in Barnes concentrated on the secondary effects (i.e., prostitution) motivation in passage of the ordinance. Justice Souter's concurrence recognized Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), wherein the U.S. Supreme Court held legislation seeking to combat the secondary effects of adult entertainment properly furthers the governmental interest of protecting society. Id. Justice Souter opined that a state may not be required to litigate secondary effects in every case. Legislatures may rely on outside studies to support the contentions of secondary effects. Barnes, supra. The District Court in Triplett I followed the secondary effects rationale, but determined the Akron ordinance invalid because there was no evidence the legislature considered secondary effects in the enactment of the ordinance. Triplett I, supra. This was not, however, the only basis on which the District Court invalidated the ordinance. The District Court went on to discuss the far-reaching nature of the ordinance and found:

> Inasmuch as adult entertainment such as nude dancing is afforded some degree of constitutional protection, it stands to reason that other types of artistic expression reached by the breadth of Akron's law will be afforded even greater First Amendment protection. The impact of Akron's law goes significantly beyond its only legitimate sweep, combatting the secondary effects of adult entertainment. Finally, it is highly improbable that an itinerant dance or theatrical company seeking to perform an artistic or cultural exhibition which included nudity would undertake the costly and time-consuming burden of federal litigation necessary to perform in Akron. For all of these reasons, Akron's ordinance is found to be substantially overbroad and plaintiff must be permitted to challenge the statute on behalf of others as well as on their own behalf. To hold otherwise will allow the City to chill valuable First Amendment speech.

Triplett I at 1257. On appeal to the Sixth Circuit, the District Court was affirmed. This affirmation came despite the Circuit Court's conclusion that the District Court erred in ruling the Akron ordinance, as applied, was unconstitutional on the basis that evidence of secondary effects was not present. The Circuit Court found the District Court has placed a burden of proving affirmative evidence of secondary effects on the City when in fact Justice Souter's opinion in Barnes does not impose such a burden. Triplett II, supra at 14.[3] Nevertheless, the Circuit Court then went on to state that the City had failed to provide a nexus between nudity and non-adult entertainment (i.e., theater productions) and secondary effects and thus the ordinance was facially overbroad. Id. The concern of the Circuit Court rested upon the fact that the ordinance prohibited all nudity, including live performances with serious literary, artistic or political value. Id. at 15. The ordinance, like Erie Ordinance 75-1994, made no attempt to regulate those activities associated with

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on the narrowest grounds. Id. Since Barnes v. Glenn Theatre, supra, was a plurality decision, lower courts are obligated to focus their attention on the narrowest grounds offered in support of the decision.

[3] Because the court has found Erie Ordinance 75-1994 to be overbroad, the court will not address the secondary effects aspect of the enactment of the Ordinance. Following Barnes and Triplett II, evidence of secondary effects could be shown from outside sources rather than being directly related to the City of Erie.

undesirable secondary effects. Id. As drafted, these ordinances ban expressive conduct not generally associated with crime, sexual assault, and prostitution. Id.

This leads the court to the City's argument that the City would not enforce Ordinance 75-1994 against theater groups. This raises several concerns for the court. First, while it may be true the present administration has no intentions of enforcing the Ordinance against theatrical groups, there is no guarantee future administrations will do the same. This alone lends credence to Pap's A.M.'s argument that those in power cannot impose their moral beliefs on others. At any time, those in power may no longer be holding office, and with incoming legislatures, there would be new and different ideas of what is morally correct for the community. Second, the administration is not responsible for the enforcement of laws; the local police force bears this responsibility. Again, this leaves the enforcement of the Ordinance within the total discretion of the police force, which is not bound to follow the administration's policy on non-enforcement against the theatrical community.

In rendering this opinion, the court is mindful of the language of Supreme Court Justice David Souter who had this to say:

> Pasties and a G-string moderate the expression [of nude dancing] to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Barnes at 2471.

Conceptually, the court agrees with Justice Souter. However, since freedom of expression is a right guaranteed by the United States Constitution, the court must be very circumspect and apply stringent rules to be sure the Constitution is not violated. The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. amend. I.

Likewise, in adopting its own constitution, Pennsylvania has provided for the same freedoms. In this Commonwealth,

> . . . The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . .

Pa. Const. art. 1 §7.

The U. S. Constitution provides for the minimum level of protection afforded individual rights; however, a state constitution may provide greater protection. W. Pa. Soc. Wrkrs. v. Conn Gen. Life Ins., 512 Pa. 23, 515 A.2d 1331 (1986). It has been long recognized that Pennsylvania may afford greater protection to individual rights. Id. Article 1, Section 7, is part of Pennsylvania's Declaration of Rights and as such, is seen as a limitation of state powers. Id. This

provision has been interpreted to act as a guard against the imposition of prior restraints upon the communication of thoughts and opinions. Id. Thus, no matter how inspired a statute may be, if it restricts those freedoms which are constitutionally guaranteed, it cannot stand.

Although the court is not bound by the rationale offered in Triplett II, the court finds it to be far more persuasive then Barnes. The Erie Ordinance does not attempt to regulate only those activities associated with secondary harmful effects and does not contain any limiting provisions. Cf. Cafe 207, Inc. v. St. John's County, No. 92-390 (M.D. Florida 1994). All nudity is prohibited, despite the City's promises to the contrary. This leaves the statute applicable to other types of protected speech which contain nudity (i.e., theatrical performances). Simply stated, the Ordinance is overbroad. While the court has thoroughly examined the Barnes decision, it finds Barnes offers little guidance. Specifically, the Barnes decision does not address the issues presented here and confines the holding of the statute's constitutionality as it is applied.

The court now turns to defendants' argument that the court must sever the Ordinance in order to preserve legislation when the provision of an ordinance is found to be unconstitutional. The Ordinance itself speaks of construction and severability as follows:

> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the

> other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

City of Erie Ordinance 75-1994.

This provision is akin to 1 Pa. C.S.A. §1925, entitled Constitutional Construction of Statutes, whereby the legislature has provided where any provision or application of a statute is held invalid, the remainder shall not be affected. 1 Pa. C.S.A. §1925. This statutory construction provision applies to municipal ordinances as well. Greenwood Tp. v. Kefo, Inc., 52 Pa. Cmwlth. 367, 416 A.2d 583 (1980). Section 1925 further states that where the valid provisions of the statute are so essentially and inseparably connected with and dependent upon the void provision, it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one. 1 Pa. C.S.A. §1925. See also, Stoner v. Presbyterian University Hospital, 609 F.2d 109 (3rd Cir. 1979). While it is true that legislation enjoys the presumption of constitutionality, see Latella v. Com. Unemployment Compensation Board, 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983), it is not without limitation. Legislation is not to infringe upon constitutionally guaranteed rights. The City would have the court strike the provision of the Ordinance which prohibits a person from appearing in a state of nudity or have the court determine the Ordinance does not prohibit those performances with serious literary, artistic,

nudity to be interwoven with the entire Ordinance so as not to be severable. To remove this provision would certainly place the Ordinance within the Pennsylvania Obscenity Statute at 18 Pa. C.S.A. §5903. Furthermore, without the provision prohibiting nudity, the Ordinance would not accomplish what the legislature intended, that being to restrict businesses which provide adult entertainment. In other words, without the anti-nudity provision, the Ordinance would serve no purpose. Finally, unlike City Council, this court cannot make the determination as to what entertainment provides serious literary, artistic or political expression. As so well stated in Salem Inn, Inc. v. Frank, 364 F.Supp. 478 (E.D.N.Y. 1973), affirmed 501 F.2d 18 (2nd Cir., 1974) affirmed in part and reversed in part, Doran v. Salem Inn, Inc., supra.

> . . . while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Id.

The court has previously expressed its reservations regarding rewriting of the Ordinance. Legislation is not this court's duty, rather adjudication is. Furthermore, where legislation is clear and unambiguous in its terms, courts have no authority to add additional language in an attempt to clarify/amend the meaning of the ordinance/statute. Com., Dept. of Trans., Bureau of Driver Licensing v. Porter, __ Pa. Cmwlth. ____, 630 A.2d 945 (1993). As such, the court declines the City's invitation to amend the Ordinance.

As the court has found Ordinance 75-1994 to be unconstitutional, the court will not address Pap's A.M.'s preemption or equal protection arguments, as they are now moot.

Finally, the plaintiff has also asked for attorney fees. Even though the court has made a decision in favor of Pap's A.M., it believes the City enacted this Ordinance in good faith as it was relying on case law and in fact, Triplett II had not yet been decided by the Circuit Court when the ordinance was enacted. As such, the court finds that the awarding of attorney fees would be inappropriate.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties to this action and the subject matter thereto.

2. Plaintiff has standing in which to bring this action.

3. The City of Erie Ordinance 75-1994, as drafted, violates Article 1, Section 7, of the Pennsylvania Constitution and the First Amendment of the United States Constitution in that the Ordinance is overbroad as it prohibits all nudity, whether or not said nudity is related to adult entertainment.

4. A permanent injunction is hereby GRANTED in favor of plaintiff against defendants and defendants shall be barred from enforcing Ordinance 75-1994. The effective date of this permanent injunction is January 18, 1995.

5. City of Erie Ordinance 75-1994 is hereby declared unconstitutional and so shall be stricken.

PAP'S A. M. t/d/b/a KANDYLAND, Plaintiff	)	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	)	
	)	CIVIL DIVISION
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Defendants	)	No. 60059 - 1994

FINAL ORDER[4]

AND NOW, to-wit, this 18th day of January, 1995, plaintiff's complaint and request for a permanent injunction is hereby GRANTED. Defendants, by and through their agents, are barred from enforcing Ordinance 75-1994 and said Ordinance is declared unconstitutional. Plaintiff's request for attorney fees is DENIED.

s/ George Levin
George Levin, Judge

[4] The parties to the action have entered into a stipulation allowing for the immediate entry of a final order rather than a decree nisi. This final order comes after a full hearing on the request for a permanent injunction and is done in anticipation of an immediate appeal.

Exhibit "A"

CITY COUNCIL OF ERIE

INTRODUCED BY: MR. THOMPSON

COUNCIL FILE NO. 14,482
OFFICIAL ORDINANCE NO. 75-1994

AN ORDINANCE

Amending Article 7 of the Codified Ordinances of the City of Erie (General Offenses) by repealing the present Article 711 - Indecency and Immorality, and substituting a new Article 711 to be titled Public Indecency, prohibiting certain conduct in public places, providing definitions relating thereto, and providing penalties for the violators thereof, including fines, imprisonment, and declaration of public nuisance, as appropriate.

WHEREAS the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity; and

WHEREAS, Council, by various enactments of General Offenses of Article 711 and 112, as well as amendments to the Zoning Ordinance, has expressed its intention to limit or restrict such lewd immoral activities, to

provide penalties for violations thereto and, in appropriate cases to declare the locations of such activities to be a public nuisance subject to abatement; and

WHEREAS, Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare; and

WHEREAS, over the years, various statutes and court interpretations have been enacted and decided, which compel periodic re-evaluation and revision of City ordinances and regulations; and

WHEREAS, the current Article 711, Indecency and Immorality, the provisions of which date back as far as the year 1866, is outdated in part and unnecessary in part, and should be entirely replaced with new language consistent with current state and federal law; and

WHEREAS, Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in Barnes vs. Glen Theatre Inc., et al 111 Sup. Ct. 2456 (1991), for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

NOW THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY OF ERIE, PENNSYLVANIA AS FOLLOWS:

Section 1. Article 711 of the Codified Ordinances of the City of Erie (Indecency and Immorality) is hereby repealed and replaced in its entirety by a new Article 711, entitled Public Indecency, to read as follows:

1. A person who knowingly or intentionally, in a public place:

a. engages in sexual intercourse

b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

c. appears in a state of nudity, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquets [sic] halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

a. Any child under ten (10) years of age; or

b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

5. In addition to the specific penalties provided in this ordinance, it is hereby declared that any building, portion of a building, or enclosed place regularly used for the prohibited display of public nudity is a public nuisance, subjecting the owner, proprietor or other operator thereof to any and all actions authorized by the Commonwealth of Pennsylvania for the abatement of public nuisances, including, but not limited to the procedures set forth in Article 712 of the Codified Ordinances.

6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due

process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

7. PENALTY - Whoever violates this ordinance, either by commission of a public indecency, or by the promotion or maintenance of public indecency as property owner, proprietor or manager of a business, shall be guilty of a summary offense, and, upon conviction, shall be sentenced to pay a fine of not more than $1,000, or be imprisoned for not more than 90 days, or both. Each day such violation continues is a separate offense.

Section 2. That all ordinances and parts thereof conflicting herewith be and the same are hereby repealed.

Section 3. That this Ordinance shall become effective twenty days after final passage and approval by the Mayor.

We do hereby certify that the above ordinance was finally passed by the City Council on September 28, 1994.

SIGNED September 28, 1994

Attest: September 28, 1994

Chris E. Maras
President of Council

James Klemm
City Clerk

THIS ORDINANCE APPROVED THIS 30th DAY OF September, 1994.

Joyce A. Savocchio
Mayor

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAP'S A.M. t/d/b/a KANDYLAND, Appellant	:	
v.	:	No. 445 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities	:	
PAP'S A.M. t/d/b/a KANDYLAND	:	
v.	:	No. 446 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Appellants	:	Argued: November 14, 1995

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION BY JUDGE DOYLE FILED: March 27, 1996

This case involves cross appeals by Pap's A.M. d/b/a/ Kandyland (Paps) and the City of Erie, Joyce A. Savocchio, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robison, and James N. Thompson, in their official capacity as members of City Council for Erie (collectively, the City), from an order of the Court of Common Pleas of Erie County which granted Paps' permanent injunction and declared the City's public indecency Ordinance 75-1994 unconstitutional.

On September 28, 1994, City Council for the City of Erie enacted a public indecency Ordinance 75-1994 (Ordinance), effective October 12, 1994.[1] The portion of the

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[1] The Ordinance states in relevant part:
Section 1. . . .

1. A person who knowingly or intentionally, in a public place:

   a. engages in sexual intercourse

   b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code

   c. appears in a state of nudity, or

   d. fondles the genitals of himself, herself or another person commits Public

Ordinance which is challenged is Section 1, subsection (c) which makes it a summary offense for anyone to appear in public in a state of nudity. Thus, this section of the Ordinance requires female erotic dancers to wear "pasties"

Indecency, a Summary Offense.

2. "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.

3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

4. The prohibition set forth in subsection l(c) shall not apply to:

   a. Any child under ten (10) years of age; or

   b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.

(Section 1 of Ordinance 75-1994.)

and "G-strings."

Paps is the operator of "Kandyland," an establishment which features nude erotic dancing.[2] On October 14, 1994, Paps filed a complaint in equity requesting a declaratory judgment declaring the ordinance unconstitutional, and Paps further requested injunctive relief and attorney fees.[3] On October 17, 1994, Paps filed a petition for a preliminary injunction to prevent the enforcement of the Ordinance, which the court denied. On January 18, 1995, after the final hearing was held relative to Paps' permanent injunction request, the court granted the permanent injunctive relief, declaring the Ordinance unconstitutional as facially overbroad, but denied Paps' request for attorney fees.

The City appealed alleging that (1) Paps does not have standing to challenge the Ordinance; (2) the Ordinance is not violative of Paps' right to free speech under the First Amendment of the Federal Constitution or Article 1, Section 7 of the Pennsylvania Constitution; (3) the Ordinance may be interpreted in a restrictive manner so as to avoid being deemed facially overbroad; (4) Pennsylvania's obscenity statute does not preempt the Ordinance; and (5) the named elected officials are not proper parties in the litigation. Paps' appeal asserts that the court erred in failing to award it attorney fees.

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[2] Alcoholic beverages are not served at Kandyland, but patrons are permitted to bring their own. Such an establishment is commonly referred to as a "bottle club."

[3] Although not parties in the case, the Erie Playhouse and the Roadhouse Theater were permitted to address the court in the final hearing held on December 21, 1994 with consent of the parties.

STANDING

The City avers that Paps has no standing to challenge the validity of the Ordinance, since its constitutional rights are not at issue, because the Ordinance only applies to the non-speech element of the nude dancing.

It is well established that a First Amendment constitutional challenge based upon the doctrine of overbreadth is an exception to traditional rules of standing. Osborne v. Ohio, 495 U.S. 103 (1990); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994). Parties whose activities could properly be proscribed by an ordinance or statute may attack it on its face as being overly broad. Broadrick v. Oklahoma, 413 U.S. 601 (1973); City of Philadelphia v. Cohen, 479 A.2d 32 (Pa. Cmwlth. 1984). The impetus for granting standing liberally in First Amendment cases is to ensure that the free exchange of ideas will not be inhibited. Broadrick.

Here, Paps has challenged the Ordinance as not only being unconstitutional by infringing upon its own First Amendment rights, but also as being impermissibly broad, impinging upon the rights of other parties whose constitutionally protected speech may be affected, i.e., theaters. Thus, Paps has standing.

FIRST AMENDMENT - FREEDOM OF SPEECH

In Pennsylvania, a statute enjoy [sic] a strong presumption of constitutionality, and will not be found to be invalid unless it clearly, palpably and plainly violates the constitution. Patton v. Republic Steel Corp., 342 Pa. Superior Ct. 101, 492 A. 2d 411 (1985). The party challenging the statute has the burden to prove that it is invalid. Id.

The issues this Court must address are whether the Ordinance violates Paps' right to freedom of expression as guaranteed by the First Amendment to the United States Constitution[4] or Article 1, Section 7 of the Pennsylvania Constitution.

First Amendment of the United States Constitution

The City argues that under the holding of the United States Supreme Court's decision in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), this Ordinance does not violate the First Amendment because it is only restricting conduct, not expression, and any slight infringement on First Amendment rights is permissible to protect the public from the secondary effects associated with the nude dancing. The City, as additional support for its proposition, cites United States v. O'Brien, 391 U.S. 367 (1968).

In O'Brien, the Supreme Court stated that to determine if a statute violates the First Amendment, the court must examine (1) whether the statute or regulation is within the constitutional power of the government to regulate; (2) if it furthers an important or substantial government interest; (3) if the government interest is related or unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of that interest. Id. at 376-77.

Paps, on the other hand, argues that the four-part test

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[4] The federal constitutional guarantee of freedom of expression is applicable to states through the Fourteenth Amendment's due process clause. Long v. 130 Market Street Gift & Novelty of Johnstown, 294 Pa. Superior Ct. 383, 440 A.2d 517 (1982).

enunciated in O'Brien, which the Supreme Court relied upon in Barnes, was not satisfied in this case because this Ordinance was merely enacted to promote morality upon the public, and not to combat secondary effects.

Barnes, a plurality decision,[5] involved the constitutionality of an Indiana statute, which is virtually identical to the one in our case.[6] The challengers to the statute were owners and operators of bars that featured nude dancing as entertainment, and they challenged the statute as being violative of the First Amendment of the United States

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[5] Chief Justice Rehnquist wrote for Justice O'Connor and Justice Kennedy. Justice Souter and Justice Scalia concurred separately. Justice White wrote the dissent, to which Justice Marshall, Justice Blackmun and Justice Stevens joined.

[6] The Indiana statute states in pertinent part:

> A person who knowingly or intentionally in a public place:
>
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Ind. Code §35-45-4-1.

Constitution.[7]

The opinion of the Chief Justice stated that while nude dancing is expressive conduct within the peripheral boundaries of First Amendment protection, it is only marginally protected.[8] Chief Justice Rehnquist also wrote that applying the four-part test in O'Brien to the facts before it, the Indiana indecency statute was constitutional because it furthered a substantial government interest of protecting morality and societal order. The Ordinance reflected the public's disapproval of nudity in public. Moreover, the opinion stated that the restrictions of the statute were unrelated to the suppression of freedom of expression since it was **public nudity** the states wish to prevent, whether or not it is combined with expression, not the message. Barnes, 501 U.S. at 570-71.

The Chief Justice also found that public nudity is not per se expression. The requirement that the dancers wear "pasties" and "G-strings" does not regulate the communicative aspects of the dancing, but the conduct and the message of eroticism is still portrayed although in a less graphic manner. Id. Thus, the state's substantial interest in protecting the public health, safety and morals is enough to justify the slight infringement of First Amendment freedom of expression rights.

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[7] The Indiana statute was also challenged as being unconstitutionally overbroad.

[8] Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware 10 F.3d 123, 130 (3d Cir. 1993) (total suppression of erotic materials which have some artistic value will not be tolerated. "[I]f the regulation of sexually explicit materials is aimed primarily at suppression of First Amendment rights, then it is thought to be content-based and so presumptively violates the First Amendment").

Justice Souter, concurring, agreed that nude dancing is afforded some minimal First Amendment rights, but disagreed on how the O'Brien test applied. He based his concurrence "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments." Barnes, 501 U.S. at 582 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). Justice Scalia also concurred in the result, but stated that nude dancing has no First Amendment protection, and the state need only demonstrate that a rational basis exists for the statute, i.e., it was enacted for the health, welfare, and safety of the public.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments in the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Applying the Marks rule, Justice Souter's opinion articulates the holding of the Court since it shares with the majority of the Justices a common underlying approach and, since Justice Souter ruled on the narrowest ground, his concurrence therefore is the law. Triplett Grille, Inc. Thus, following Justice Souter's reasoning, an ordinance regulating speech can survive scrutiny if it satisfies the test in O'Brien, and is designed to prevent secondary effects associated with adult entertainment. Barnes; O'Brien; Triplett Grille, Inc.

Paps argues that the Ordinance does not meet the

requirements of O'Brien and Barnes,[9] because the Ordinance was enacted to promote the morality of the City of Erie, which under the analysis enunciated by Justice Souter is not a substantial government interest. Paps points to some statements made by members of City Council during the discussion of this Ordinance as support for its contention that the Ordinance was only enacted to preserve the morals of the community.

However, the purpose underlying the enactment of the Ordinance is revealed in the Ordinance itself. The Ordinance states in relevant part:

> WHEREAS, Council specifically wishes to adopt the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the Supreme Court in Barnes vs. Glen Theatre Inc., for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

(City of Erie Ordinance 75-1994.) (Citation omitted) (Emphasis added.)

Although some members of City Council voiced their personal reasons of morality as the impetus for their support

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[9] It is interesting to note that in Barnes, Justice Souter assumed that the legislators took the secondary effects into consideration.

of the Ordinance, (Reproduced Record (R.R.) at 32a-44a),[10] the Ordinance clearly and unambiguously states that it was enacted to prevent the commission of various sex-related crimes associated with nude dancing; that is, secondary effects. Statements made by lawmakers during the enactment procedure are not dispositive of the legislative intent, Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983); see also 1 Pa. C.S. §1921(c)(7). Furthermore, the legislative history cannot act as a rationale for contradicting the plain meaning of the words contained in a statute itself. Borough of West Chester v. Taxpayers of the Borough of West Chester, 566 A.2d 373 (Pa. Cmwlth. 1989).

Governmental attempts at controlling secondary effects associated with adult entertainment serve the government's substantial interest in promoting the health, safety and welfare of the people. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Thus, the first prong of O'Brien, which requires that the restriction be within the constitutional power of the state, is met.

The second prong of the O'Brien test, that the restriction furthers a substantial government interest, is also satisfied. The Supreme Court in City of Renton stated that the government was not required to provide specific data which demonstrates that harmful secondary effects correlate to the presence of establishments which provide adult entertainment. City of Renton; Mitchell, 10 F.3d at 133

[10] Mr. Thompson, Mr. Brabender, Mr. Bagnoni, and Mr. Maras said that they support the Ordinance because of their desire to instill good values on the public. Mrs. Robinson, who was absent from the meeting, stated in a letter that she supported the ordinance to protect the morals of the community. (Transcript of the videotape of City Council's 9/28/94 meeting; R.R. at 32a-44a.)

("[t]he First Amendment does not require a city before enacting such an ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"). The city only needs to show that adult entertainment establishments is a class of conduct which causes the unwanted secondary effects the statute regulates. City of Renton; Mitchell.

Here, the type of activity at issue is the same exact variety as the restricted entertainment in Barnes; therefore, it is proper for this Court to find that the same harmful secondary effects which were found to be caused by the nude erotic dancing in Barnes, will also occur in this case, and that this Ordinance furthers the City's substantial interest in safeguarding the public from these harmful secondary effects. Thus, the second prong of O'Brien is met.

The third requirement of O'Brien is that the government's interest must be unrelated to the suppression of free expression. In Barnes, Justice Souter, along with a majority of the Court, found that a statute which bans public nudity is not related to the suppression of the erotic message, that is, the expressive component of the dance. Justice Souter states that the restriction directly relates to the prevention of the secondary effects.[11] Barnes; Compare Berg v. Health & Hospital Corporation of Marion County, 865 F.2d 797 (7th Cir. 1989) (restrictions on the types of doors or openings to individual entertainment booths merely regulate the

[11] Chief Justice Rehnquist states that the ban on public nudity is unrelated to freedom of expression because the evil the government pursues is public nudity, whether or not it is combined with expressive conduct. Barnes, 501 U.S. at 570-71.

non-communicative aspects of the erotic activity and thereby impose only an incidental burden on plaintiff's first amendment rights); Mini Spa, Inc. v. South Salt Lake City Corp., 810 F.2d 939 (10th Cir. 1987) (city's interest in regulating prostitution through an ordinance prescribing a dress code for massage parlors was unrelated to inhibiting freedom of expression).

Here, like in the statute in Barnes, the requirement that the dancers wear "pasties" and "G-strings" is not related to the suppression of the erotic expression, but is related to the avowed purpose of safeguarding the public from the harmful secondary effects associated with adult entertainment.

The last prong of O'Brien is that the restriction be no greater than is essential for the furtherance of the government interest. Such restriction is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." United States v. Albertini, 472 U.S. 675, 689 (1985). Again, as was found in Barnes, we hold that requiring dancers to don "pasties" and "G-strings" infringes on the dancers' expression only inconsequentially. The erotic message is still able to be conveyed; it is just less graphic, and therefore, the prohibition of public nudity is narrowly tailored. Barnes. Following the sound reasoning of Justice Souter in Barnes, we similarly conclude that the City's Ordinance is narrowly tailored.

Accordingly, the Ordinance satisfies the requirements of O'Brien and does not violate Paps' First Amendment rights, despite the incidental limitations on some expressive activity.[12]

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[12] See Turner v. State, 650 N.R. 2d. (Ind. Ct. App. 1995), petition for cert. filed, (Jan. 18, 1996) ; State ex rel. Miller v. Private Dancer, 613 N.E. 2d 1066 (Ohio Ct. App. 1992).

Article 1, Section 7 of the Pennsylvania Constitution

It is clear that the federal Constitution affords the minimum protection of individual rights, and a state may, if it so chooses, interpret a state constitution to afford greater protection of fundamental rights. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

Article 1, Section 7 of the Pennsylvania Constitution provides protection for the "free communication of thoughts . . . and every citizen may freely speak, write and print on any subject . . . being responsible for the abuse of that liberty." Article 1, Section 7 of the Pennsylvania Constitution. The Pennsylvania Constitution provides essentially the same protection of expression as does the United States Constitution, and to that extent, what we have concluded above regarding the federal Constitution would also apply to our own Pennsylvania Constitution. See Long v. 130 Market Street Gift & Novelty of Johnstown, 294 Pa. Superior Ct. 383, 440 a.2d [sic] 512 (1982). Neither constitution provides for unfettered freedom of expression. The Pennsylvania Constitution, however, does differ in that it has codified the proscription of the imposition of prior restraints on speech, whereas pursuant to the federal Constitution, prior restraints are prohibited in most situations based upon the common law. See Freedom v. Maryland, 380 U.S. 51 (1965); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance, Co., 512 Pa. 23, 515 A.2d 1331 (1986).

A prior restraint in general terms is a prohibition on speech in advance of its publication or expression. United States v. Schiavo, 504 F.2d 1 (3d. Cir.) cert. denied, 419 U.S. 1096 (1974). The restraint must unduly burden the expression to be violative. Id. The instant case does not

involve a prior restraint because: (1) the Ordinance is not regulating the expressive element of the dance, but rather, the conduct or manner of the dance; and (2) the requirement that the dancers wear "pasties" and "G-strings" is not unduly burdensome.

Accordingly we hold that in this case that the Ordinance does not violate Section 7 of Article 1 of the Pennsylvania Constitution.

OVERBREADTH

A statute which implicates First Amendment freedoms of expression may be declared unconstitutional where the regulations are overbroad by significantly compromising clearly recognized First Amendment rights. Broadrick, 413 U.S. 601 (1973). The overbreadth doctrine is "strong medicine" which is used only sparingly and only as a last resort. Id. R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992). "[A] regulation's invalidation threshold for overbreadth increases when the activity regulated moves from speech to conduct having an incidental impact on First Amendment rights." City of Philadelphia v. Cohen, 479 A.2d 32, 35 (Pa. Cmwlth. 1984); see also Mitchell. "[A] statute is not overbroad merely because its application implicates protected activity." Marie Guy v. Woods, 522 A.2d 193, 195 (Pa. Cmwlth. 1987).

Paps successfully argued below that the Ordinance was unconstitutional on its face because it is overbroad, since it proscribes all public nudity, even live performances with serious literary, artistic or political value.[13] Paps relies

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[13] Bill Morton, a representative of the Erie Playhouse and the Roadhouse Theater, informed the lower court during the final hearing that

heavily on Triplett Grille, Inc. as support for its argument. The City, on the other hand, appears to argue that the ordinance is not overly broad, because it is subject to a limiting interpretation, based upon the holding in Barnes.

Triplett Grille, Inc. involved an Akron, Ohio, indecency ordinance, which, like the ordinance at issue here and in Barnes, banned public nudity. An adult establishment which featured nude dancing challenged the ordinance, inter alia, on its face as being overbroad.

The Federal Court of Appeals for the Sixth Circuit held that although the ordinance had been enacted in part due to the city council's concern for the secondary effects, it was unconstitutional because the ordinance prohibited all public nudity including that related to literary, artistic and political value, and made no attempt to regulate only those expressive activities associated with the secondary effects, and, therefore, swept too broadly. Triplett Grille, Inc. "Because [Akron] failed to present evidence linking expressive nudity in 'high-culture' entertainment [theatrical performances such as, "Hair" or "Equus"] to harmful secondary effects, we conclude that the ordinance infringes speech protected by the First Amendment." Triplett Grille, Inc., 40 F.3d at 136.

The court continued and stated: "While loath to find that the Akron public indecency ordinance violated the First Amendment, this Court is unable to supply a limiting construction for the regulation. It is well recognized that federal 'courts do not rewrite statutes to create

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he fears that the Ordinance will adversely affect the arts community by inhibiting certain types of artistic performances at the playhouse which involve some nudity. (Transcript of 12/21/94 final hearing at 18-19; R.R. at 173a-74a.)

constitutionality.'" Id. However, a state court handling a state statute challenged as overbroad, should construe the statute to avoid constitutional problems, when the statute is subject to a limiting construction, New York v. Ferber, 458 U.S. 747 (1982), as was done by the Indiana State Supreme Court in Barnes.

In Barnes, the United States Supreme Court did not have to address the overbreadth doctrine because the Indiana Supreme Court adequately narrowed the indecency statute to save it from a facial overbreadth attack. The state court held that it is within the state's power to prohibit public nudity, and that the statute was designed to regulate conduct, not speech. The court also recognized that some public nudity would be tolerated where a communication of ideas is involved. Therefore, the court adequately tailored the statute to apply only to non-expressive activities. We do the same here.

Although it is arguable that the Ordinance could affect protected expression, Paps' claim that the Ordinance is overbroad is neither "substantial" nor "real."[14] The number of artistic performances which involve nudity is slight, and, therefore, the infringement on protected areas of speech is insubstantial. And, if, there is any attempt to enforce the Ordinance against such artistic and theatrical performances,

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[14] Accord SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578, 584 (D. Vt. 1995) (ordinance which prohibits public nudity is not overbroad because the sweep is not "substantial." Only a few serious artistic works involve nudity, and the ordinance "does not encompass a sufficient amount of protected behavior . . . "). But cf. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (an ordinance which bans all live entertainment - adult or otherwise - is unconstitutionally overbroad).

the parties whose rights are infringed upon could bring a First Amendment challenge. Furthermore, it is undisputed that a performance of "Equus" occurred at the Roadhouse Theatre during the months of October and November of 1994, after the City enacted the Ordinance. Thus, the overbreadth is not "real."

Furthermore, the ordinance is written to limit its enforcement. The Ordinance states in part that:

> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free of [sic] speech, free expression, due process, equal protection or other fundamental rights . . . .

(City of Erie Ordinance 75-1994.) We interpret and limit the Ordinance to ban the act of being nude in public, not expression. Barnes (requiring a dancer to wear "pasties" and a "G-string" does not directly impinge upon First Amendment rights, where a substantial government interest is involved).

Accordingly, applying the overbreadth doctrine, we hold that the Ordinance is not unconstitutional on its face.

PREEMPTION - PENNSYLVANIA'S OBSCENITY STATUTE

Paps appears to argue also that the Ordinance is preempted by the state's obscenity statute, Section 5903(a) of the Crimes Code, 18 Pa. C.S. §5903(a), because the Ordinance criminalizes nude dancing under the guise of

protecting the morals of the community, which is inconsistent with the obscenity statute of the Commonwealth which also was enacted to protect the morals of the community. The City counters that the local indecency Ordinance is consistent with the Commonwealth's obscenity statute, and therefore, is not preempted.

The obscenity statute provides in part:

> (a) OFFENSES DEFINED.-- No person, knowing the obscene character of the materials or performances involved, shall:
>
> . . . .
>
> (5) produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; or
>
> . . . .
>
> (b) DEFINITIONS. . . .
>
> "OBSCENE." Any material or performance, if:
>
> (1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;
>
> (2) the subject matter depicts or describes in a patently offensive way, sexual conduct . . .
>
> (3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

> . . . .
>
> (k) ORDINANCES OR RESOLUTIONS.-- Nothing in this chapter shall be construed to invalidate, supersede, repeal or preempt any ordinance or resolution of any political subdivision insofar as it is consistent with this chapter, and political subdivisions further retain the right to regulate any activities, displays, exhibitions or materials not specifically regulated by this chapter.

Section 5903 of the Crimes Code, 18 Pa. C.S. §5903.

In Council of Middletown Township v. Benham, 514 Pa. 176, 523 A.2d 311 (1987), the court stated that merely because a state has legislated in an area of law does not denote that the state law preempts the field. "The General Assembly must clearly show its intent to preempt a field in which it has legislated. The test for preemption . . . . is well established. Either the statute must state on its face that local legislation is forbidden, or 'indicate[] an intention on the part of the legislature that it should not be supplemented by municipal bodies.'" Id. at 180-81, 523 A.2d at 313 (citations omitted) (alterations in the original).

The obscenity statute at issue does not state that it preempts the field, and in fact, subsection (k) of the statute permits local governments to enact laws in the area of obscenity as long as they are consistent with the statute. The indecency Ordinance and obscenity statute may overlap in some areas, but they regulate different activities. The Ordinance was enacted to prohibit public nudity, not obscene

behavior,[15] and was designed to protect the public from the secondary effects associated with nude dancing, not lewd behavior. It was not enacted for the purpose of criminalizing obscene behavior; in fact, the Ordinance does not mention obscenity.[16]

Accordingly, we hold that the Ordinance is not preempted by the Pennsylvania obscenity statute.

ATTORNEY FEES AND NAMED PARTY - DEFENDANTS

Since we find that the Ordinance is constitutional and is not preempted by the obscenity statute, we need not address the two remaining issues (1) whether the denial of attorney fees was in error and (2) whether the individually named defendants (the named City Council members) are proper parties to this case.

Accordingly, we reverse the order of the Court of Common Pleas of Erie County.

s/ Joseph T. Doyle
JOSEPH T. DOYLE, JUDGE

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[15] Nude dancing alone is not considered an obscene activity. See Barnes.

[16] Compare 1916 Delaware Tavern v. Zoning Board of Adjustment, 657 A.2d 63 (Pa. Cmwlth. 1995). In this case, the Court held that a zoning ordinance which restricted the locations of cabarets featuring erotic dancing was not preempted by the Liquor Code, Act of April 12, 1951, P.L. 90, as amended, 47 P.S. §§ 1-101 to 9-902. The Court found that the Liquor Code and the zoning ordinance were not inconsistent, even though the Liquor Code prohibited nude erotic dancing and the zoning ordinance restricted locations of cabarets that featured exhibitions of specified anatomical areas.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PAP'S A.M. t/d/b/a KANDYLAND, Appellant	:	
v.	:	No. 445 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities	:	
PAP'S A.M. t/d/b/a KANDYLAND	:	
v.	:	No. 446 C.D. 1995
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, in their official capacities, Appellants	:	

O R D E R

NOW, March 27, 1996, the order of the Court of Common Pleas of Erie County, is hereby reversed.

s/ Joseph T. Doyle
JOSEPH T. DOYLE, JUDGE

CERTIFIED FROM THE RECORD
AND ORDER TEXT

AR 27 1996

s/ C.R. Hostutler
Deputy Prothonotary-
Chief Clerk

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Pap's A.M. t\d\b\a\	:	230 & 231 Western
Kandyland	:	District Allocatur
Petitioner	:	Docket
	:	
v.	:	Petition for Allowance
	:	of Appeal from the
The City of Erie,	:	Commonwealth Court
Joyce A. Savocchio,	:	
Chris E. Maras,	:	
Mario S. Bagnoni,	:	
Robert C. Brabender,	:	
Denise Robinson [sic],	:	
and James N. Thompson,	:	
in their official capacities,	:	
Respondents	:	

ORDER

PER CURIAM:

AND NOW, this 28th day of January, 1997, the Petition for Allowance of Appeal is hereby **GRANTED, BUT LIMITED** to the following issues:

I. Whether the Erie City Ordinance is unconstitutionally overbroad.

III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and

Article I, section 7 of the Pennsylvania Constitution.

Madame Justice Newman did not participate in the consideration or decision of this matter.

A True Copy Amy J. Ceraso, Esquire
as of: January 28, 1997

Attest: s/Amy Ceraso

Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX F

[J-142-1997]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S A.M. t/d/b/a KANDYLAND,	:	Nos. 016 and 017 Western District Appeal Docket 1997
Appellant	:	
v.	:	Appeal from the Order of the Commonwealth Court of Pennsylvania,
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic], and JAMES N. THOMPSON, in their official capacities, Appellees	:	entered March 27, 1996 at Nos. 445 and 446 C.D. 1995, Reversing the Order of the Court of Common Pleas of Erie County, Pennsylvania, Civil Division, entered January 18, 1995 at No. 60059 of 1994
	:	674 A.2d 338 (Pa. Commw. Ct. 1996).
	:	ARGUED: September 16, 1997

OPINION OF THE COURT

MR. JUSTICE CAPPY DECIDED: OCTOBER 21, 1998

This is an appeal by allowance from the order of the Commonwealth Court reversing the trial court's order permanently enjoining the enforcement of the City of Erie's Ordinance 75-1994 ("Ordinance"), and striking the Ordinance in its entirety. For the following reasons, we now reverse.[1]

On September 28, 1994, the City Council for the City of Erie ("City Council") enacted the Ordinance.[2] The

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[1] We have jurisdiction over this matter pursuant to 42 Pa.C.S. § 724.

[2] The Ordinance states in relevant part:

> 1. A person who knowingly or intentionally, in a public place:
>
> a. engages in sexual intercourse;
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;
>
> c. appears in a state of nudity, or
>
> d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense.
>
> 2. "Nudity" means the showing of the human male or female genital (sic), pubic area or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
>
> 3. "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.
>
> 4. The prohibition set forth in subsection l(c) shall not apply to:
>
> a. Any child under ten (10) years of age; or
>
> b. Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age.
>
> . . . .
>
> 6. CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance. Should a court of competent jurisdiction determine that any part of this ordinance, or any application or enforcement of it is excessively restrictive of such rights or liberties, then such portion of the ordinance, or specific application of the ordinance, shall be severed from the remainder, which shall continue in full force and effect.

Ordinance states, inter alia, that it is a summary offense to appear in a "state of nudity". In order to avoid being in a "state of nudity," a female person over the age of ten years of age would have to wear, at a minimum, what are commonly known as "pasties" and a "G-string". The effective date for the Ordinance was October 12, 1994.

Pap's A.M. ("Appellant") is the operator of an

establishment known as "Kandyland" which features nude erotic dancing performed by women. On October 14, 1994, Appellant filed a complaint in equity, naming the City of Erie, the mayor for the City of Erie, and the members of the City Council ("Appellees") as defendants. In its complaint, Appellant requested a declaratory judgment declaring the Ordinance unconstitutional as well as injunctive relief and attorney's fees.

The Court of Common Pleas of Erie County held hearings on this matter. On January 18, 1995, the trial court determined that the Ordinance was unconstitutionally overbroad on its face. It therefore granted the permanent injunction and struck down the Ordinance. The trial court, however, denied Appellant's request for attorney fees.

Appellant and Appellees cross-appealed to the Commonwealth Court. The Commonwealth Court determined that the trial court erred when it held that the Ordinance was unconstitutionally overbroad. Furthermore, it determined that Appellant's additional claim that the Ordinance impermissibly infringed upon Appellant's right to freedom of expression as guaranteed by the United States and Pennsylvania Constitutions was not borne out. It therefore reversed the trial court's order striking the Ordinance and awarding Appellant injunctive relief.[3]

Appellant then filed a petition for allowance of appeal with this court. We granted review, limited to the issues of whether the Ordinance violates the right to freedom of expression as guaranteed by the United States and

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[3] Since the Commonwealth Court found that the Ordinance was constitutional, it saw no need to address Appellant's claim that it was entitled to attorney's fees.

Pennsylvania Constitutions and whether the Ordinance is unconstitutionally overbroad.[4]

In examining whether the ordinance violates Appellant's freedom of expression as guaranteed by the First Amendment[5], we must initially determine whether nude dancing constitutes expressive conduct which is within the First Amendment's protective ambit. The act of being in the nude is not, in and of itself, entitled to First Amendment protection because no message is being conveyed. Cf. Texas v. Johnson, 491 U.S. 397, 403-406, 109 S.Ct. 2533, 2539-2540, 105 L.Ed.2d 342, 352-354 (1989) (act of desecrating flag is not critical point in determining whether actor is engaging in expressive conduct; rather, the question to be answered is whether the actor intended to convey a particularized message). Yet the act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection. We can say this with certainty because a majority of the United States Supreme Court recently endorsed such a view in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Although Barnes was an otherwise hopelessly fragmented decision, eight of the nine members of the Court agreed that nude dancing, as it portrayed an erotic message, is expressive conduct and is entitled to some quantum of protection under the First Amendment. Id. at 565-566, 111 S.Ct. at 2460, 115

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[4] In reviewing the determination of the court below, our scope of review is plenary as the issues presented in this case are questions of law. See Phillips v. A-BEST Products Co., 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

[5] The First Amendment is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 855 n. 1, 102 S.Ct. 2799, 2802 n.1, 73 L.Ed.2d 435, ___ n. 1 (1982).

L.Ed.2d at 511 (Rehnquist, C.J., authoring the opinion announcing the judgment of Court, joined by O'Connor and Kennedy, JJ.); id. at 581, 111 S.Ct. at 2468, 115 L.Ed.2d at 521 (Souter, J., concurring); id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.)

As we have determined that nude dancing is entitled to some First Amendment protection, we must next decide whether the Ordinance is related to the suppression of expression. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352. In making this determination, we determine whether the governmental interest in enacting the Ordinance was a content-neutral one. See United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968). Resolution of this inquiry is critical to our analysis for if the Ordinance is related to the suppression of expression, then the onerous strict scrutiny test applies. Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352; see also United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 744 (1983) (content-based restrictions will be upheld only if they are narrowly drawn to accomplish a compelling governmental interest.) If, however, the governmental interest is content-neutral, and therefore is unrelated to the suppression of expression, "then the less stringent standard . . . announced in United States v. O'Brien for regulations of noncommunicative conduct controls."[6]

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[6] The O'Brien Court stated that the "government regulation is sufficiently justified" if it meets all factors of the following four-part test:

1) Promulgation of the regulation is within the constitutional power of the government;
2) The regulation furthers an important or substantial governmental interest;
3) The governmental interest is unrelated to the suppression of free expression; and

Johnson, 491 U.S. at 403, 109 S.Ct. at 2539, 105 L.Ed.2d at 352.

In determining whether the Ordinance is related to the suppression of free expression, the Commonwealth Court below turned for guidance to the United States Supreme Court's decision in Barnes, supra, a case which presented a situation very similar to the one presented in the matter sub judice. After engaging in the difficult task of determining what, if any, holding could be gleaned from the hopelessly fragmented Barnes Court, the Commonwealth Court determined that the concurring opinion authored by Justice Souter was dispositive.

We, too, begin our analysis of whether the Ordinance is content-based by reviewing the Barnes decision. The Court in Barnes analyzed an Indiana statute, which is strikingly similar to the Ordinance we are examining, to determine whether that statute violated the First Amendment. Unfortunately for our purposes, the Barnes Court splintered and produced four separate, non-harmonious opinions. We must review each of the opinions to see if any holding can be gleaned from them.

The Chief Justice, in his opinion announcing the judgment of court, concluded that nude dancing is expressive conduct within the peripheral boundaries of First Amendment

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4) The incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968).

protection. He determined that the statute in question was a content-neutral restriction on speech since the governmental interest in protecting societal order and morality was unrelated to the suppression of free expression. Id. at 568, 111 S.Ct. at 2461, 115 L.Ed.2d at 512. He went on to conclude that the statute met the less stringent standard of O'Brien.

Justice Scalia authored a separate concurring opinion. Barnes, 501 U.S. at 572, 111 S.Ct at 2463, 115 L.Ed.2d at 515 (Scalia, J. concurring). Although he agreed with the Chief Justice's conclusion that the statute was constitutional, Justice Scalia arrived at this conclusion by a radically different route. Disagreeing with the other eight members of the Court, he would have found that nude dancing is entitled to no First Amendment protection, and that only a rational basis for the statute need exist for the statute to be found constitutional. Id. at 580, 111 S.Ct. at 2468, 115 L.Ed.2d at 520.

Justice Souter also agreed with the result reach [sic] by the Chief Justice, but wrote separately to express his view that the content-neutral governmental interest forwarded by the statute was prevention of the negative secondary effects (such as prostitution, sexual assault, and other criminal acts) which are associated with nude dancing establishments. Id. at 582, 111 S.Ct. at 2469, 115 L.Ed.2d at 522 (Souter, J., concurring).

Justice White's dissenting opinion, which was joined by Justices Marshall, Blackmun, and Stevens, garnered the most votes of any of the Barnes opinions. Id. at 587, 111 S.Ct. at 2471, 115 L.Ed.2d at 525 (White, J., dissenting). Justice White expressed the opinion that the purpose of the statute was "to protect the viewers from what the State

believes is the harmful message that nude dancing communicates." Id. at 591, 111 S.Ct. at 2473, 115 L.Ed.2d at 527. Thus, since the statute was content-based, it was subject to analysis under the strict scrutiny test, a test which the dissenters believed the statute could not pass because the statute was not narrowly tailored. Id. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529.

From this hodgepodge of opinions, the Commonwealth Court selected the concurring opinion authored by Justice Souter as expressing the position of the Court and accorded it the status of binding precedent. In arriving at this conclusion, the Commonwealth Court quoted the United States Supreme Court's dictate that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260, 266 (1977). Applying Marks to the Barnes opinions, the Commonwealth Court concluded that Justice Souter's opinion provided those "narrowest grounds" and therefore accorded it precedential effect.

While we empathize with the Commonwealth Court's plight when faced with trying to make sense out of Barnes, we cannot agree that Justice Souter's concurring opinion is binding precedent. We agree that it is possible to cobble together a holding out of a fragmented decision.[7] Yet, in order to do so, a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is

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[7] In fact, we have done so in this opinion at page 5, supra.

certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent.

It is simply not possible to find that Justice Souter's position in Barnes commanded five votes. Even if we were to assume arguendo that his concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and consistent with, the one taken by the Chief Justice, such a concession would provide only four votes for Justice Souter's position. The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on nude dancing are not to be analyzed pursuant to the First Amendment. Nor can it be said that the dissenters, who rejected the notion that the state's goal of combating secondary effects via the statute rendered the statute content-neutral, were in agreement with Justice Souter.

We find that the Commonwealth Court's determination that Justice Souter's "secondary effects" rationale represents the "holding" of Barnes is simply not borne out. In fact, aside from the agreement by a majority of the Barnes Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the Barnes Court agreed. Thus, although we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes on the issue of whether the Ordinance in the matter sub judice passes muster under the First Amendment.

Having determined that there is no United States Supreme Court precedent which is squarely on point, we turn to our own independent examination of the Ordinance itself to determine whether it is related to the suppression of free expression. The City Council stated plainly in the Ordinance that it was adopting this regulation

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

We acknowledge that one of the purposes of the Ordinance is to combat negative secondary effects. That, however, is not its only goal. Inextricably bound up with this stated purpose is an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance. We find that Justice White expressed this position most eloquently in his dissenting opinion in Barnes when he declared that

> it cannot be [said] that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory

> prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Barnes, 501 U.S. at 592, 111 S.Ct. at 2474, 115 L.Ed.2d at 528 (White, J. dissenting). We believe that Justice White's analysis is directly applicable to the situation before us now, and that the stated purpose for promulgating the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing.

We find further support for our rationale in the United States Supreme Court's holding in Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). In Forsyth County, a county ordinance imposed a fee for the issuance of parade permits. The administrator responsible for setting the fee was directed to take into account, among other things, the possible costs of police protection needed at certain events. Id. at 127, 112 S.Ct. at 2399, 120 L.Ed.2d at 109. "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." Id. at 134, 112 S.Ct at 2403, 120 L.Ed.2d at 113-114.

As in the matter sub judice, the governmental entity

in Forsyth declared that the ordinance permitting the adjustable fee was content-neutral because it was "aimed only at a secondary effect - - the cost of maintaining public order." Id. at 134, 112 S.Ct. at 2403, 120 L.Ed.2d at 114. The Court flatly rejected this argument, stating that the secondary effects rationale was inextricably linked with the suppression of speech for the negative secondary effects were related to the content of the expressive message conveyed by the marchers. The Court cogently stated that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Id.

Similarly, the negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance. Thus, as in Forsyth County, we find that a content-neutral reason is insufficient to save the ordinance since it is inextricably linked with a content-based motivation for the restriction.

Since the Ordinance's restrictions are content-based, we must now determine if the Ordinance passes the strict scrutiny test. Grace, 461 U.S. at 177, 103 S.Ct. at 1707, 75 L.Ed.2d at 744. In order to pass the strict scrutiny test, the burden is on Appellees to establish that the ordinance is narrowly drawn to accomplish a compelling governmental interest. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118, 112 S.Ct. 501, 509-510, 116 L.Ed.2d 476, 488 (1991).

We begin our review of this issue by noting that Appellees have not presented us with a strict scrutiny analysis as part of their brief. Establishing that the Ordinance passes the strict scrutiny test is a burden for Appellees to bear. Simon & Schuster, supra. Appellees' utter failure to carry their burden on this point would be a sufficient reason to find that the strict scrutiny test was not met here.

Furthermore, our own independent analysis of this issue leads us to conclude that the strict scrutiny test cannot be satisfied. The most compelling governmental interest which could be articulated in connection with the Ordinance is the interest in deterring sex crimes. It is beyond cavil that curbing crimes such as prostitution and rape is a compelling governmental interest.

Yet, that determination satisfies only one half of the strict scrutiny test. It still must be established that the Ordinance is narrowly tailored to meet this compelling interest. On this front, we come to the inescapable conclusion that the Ordinance must fail. We agree with Justice White's statement in Barnes that there are several ways to combat these social ills without banning the expressive activity of nude dancing. Justice White suggested that "the State could perhaps require that, while performing, nude performers remain at all times a certain minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainment be dispersed throughout the city." Barnes, 501 U.S. at 594, 111 S.Ct. at 2475, 115 L.Ed.2d at 529. These restrictions, unlike the restrictions found in the Ordinance, could be viewed as content-neutral restrictions on the time, place, and manner in which nude dancing could be conducted, and, if so, would not trigger the strict scrutiny test.

Furthermore, we also find it highly circuitous to prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage. We believe that imposing criminal and civil sanctions on those who commit sex crimes such as prostitution or rape would be a far narrower way of achieving the compelling governmental

interest.

Now that we have determined that the Ordinance places an unconstitutional burden on Appellant's freedom of expression, we next consider Appellees' claim that we may sever the unconstitutional portions rather than striking the Ordinance in its entirety. In support of their position, Appellees' [sic] rely upon 1 Pa.C.S. § 1925[8] and the "Construction and Severability" clause of the Ordinance.[9]

When we determine that an ordinance is unconstitutional, we sever the unconstitutional portions if "the remainder of the [Ordinance] . . . shall not be affected thereby . . . ." 1 Pa.C.S. § 1925. Yet, we are specifically directed that we may not sever the unconstitutional portions of an ordinance where "the valid provisions of the [Ordinance] are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the [City Council] would have enacted the remaining valid provisions without the void one . . . ." Id.

Appellees assert that this court may "sever" the Ordinance by merely "sever[ing] only the necessary 'expressive' nudity from the ordinance . . . ." Appellees' Brief at 13. As there is no language in the Ordinance which

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[8] Section 1925 is part of the Statutory Construction Act ("Act"). In construing an ordinance, we follow the dictates of the Act even though the Act applies specifically to statutes and is not expressly applicable to local ordinances. Patricca v. Zoning Bd. of Adjustment of the City of Pittsburgh, 527 Pa. 267, 590 A.2d 744 (1991).

[9] See footnote 1, supra, for the full text of the "Construction and Severability" clause of the Ordinance.

separates non-expressive nudity from expressive nudity, we presume that Appellees would have this court draft such language and insert it into the Ordinance.

Such a position shows a fundamental misunderstanding of the mechanics of severing void portions of a statute as well as the constitutional doctrine of separation of powers. In severing void portions of a statute or ordinance, a court is empowered merely to strike existing language; the judiciary is given no authority to draft its own language and insert it into the statute or ordinance.

Limitations on the power to sever statutes and ordinances are consistent with the constitutional doctrine of the separation of powers, a doctrine which has been at the heart of our governmental system since the 1776 Plan or Form of Government for the Commonwealth or State of Pennsylvania. Dauphin County Grand Jury Investigation Proceedings (No. 2), 332 Pa. 342, 352-353, 2 A.2d 804, 807 (1938). By this doctrine, the legislative branch, and not the judicial branch, is given the power to promulgate legislation. The Federalist No. 47 (James Madison). To aggregate to ourselves the power to write legislation would upset the delicate balance in our tripartite system of government. We therefore decline Appellees' invitation.[10]

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[10] Appellees' citation to Commonwealth, Dept. of Education v. First School, 471 Pa. 471, 370 A.2d 702 (1977) for the proposition that we may rewrite the Ordinance is unavailing. In First School, this court merely excised all portions of a statute which referred to giving financial aid to sectarian schools, leaving all those provisions which gave financial aid to non-sectarian schools. No portion of First School endorsed this court violating the separation of powers by engaging in the legislative function of drafting legislation.

Yet another option for severing the Ordinance would be to remove §§ 1(c) and 2, the provisions which concern the bar to public nudity. We find this option to be tenable. In severing those portions of the Ordinance, we would remove but one of the four prohibitions. The other three forbidden activities[11] are independent of the public nudity ban, and striking §§ 1(c) and 2 would in no fashion render those other provisions inoperative. The other three prohibitions are thus not so "essentially and inseparably connected with" the public nudity ban that we could conclude that the City Council would have opted not to enact the valid provisions without §§ 1(c) and 2. We thus find that severance is appropriate pursuant to 1 Pa.C.S. § 1925, and sever §§ 1(c) and 2 from the Ordinance.

The order of the Commonwealth Court below is reversed.[12]

Madame Justice Newman did not participate in the consideration or decision of this matter.

Mr. Justice Castille files a concurring opinion in which Mr. Justice Zappala joins.

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[11] Those three activities are: publicly engaging in sexual intercourse; publicly engaging in deviate sexual intercourse; and, publicly fondling genitalia. Footnote 2, supra.

[12] As we have determined that the Ordinance violates Appellant's freedom of expression as guaranteed by the United States Constitution, there is no need for us to determine whether the comparable provision found in Article I, § 7 of the Pennsylvania Constitution is also violated. Furthermore, we need not address either Appellant's claim that the Ordinance is unconstitutionally overbroad, or Appellees' claim that Appellant lacks standing to raise this overbreadth challenge.

Judgment Entered October 21, 1998,

s/ Patricia Honard
CHIEF CLERK

[J-142-1997]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PAP'S A.M. T/D/B/A KANDYLAND, Appellant	:	Nos. 016 and 017 Western District Appeal Docket 1997
v.	:	Appeal from the Order of the Commonwealth Court of Pennsylvania,
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic], AND JAMES N. THOMPSON, in their official capacities, Appellees	:	entered March 27, 1996, at Nos. 445 and 446 C.D. 1995, reversing the Order of the Court of Common Pleas of Erie County, Pennsylvania, Civil Division, entered January 18, 1995 at No. 60059 of 1994.
	:	674 A.2d 338 (Pa. Commw. Ct. 1996)
	:	ARGUED: September 16, 1997

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: OCTOBER 21, 1998**

I agree with the majority that Sections 1(c) and 2 of the ordinance at issue must be stricken. However, because a majority of the United States Supreme Court has upheld the constitutionality of a virtually identical ordinance under the First Amendment to the Federal Constitution, and because this Court is bound by the United States Supreme Court's interpretations of the Federal Constitution, I must disagree with the majority's conclusion that the provisions of the ordinance at issue fail under the First Amendment to the Federal Constitution. Instead, I believe that the provisions of the ordinance at issue here must be stricken under Article I, § 7 of the Pennsylvania Constitution. Accordingly, I concur only in the result reached by the majority in this matter.

The United States Supreme Court case which lies at the crux of this matter is Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). In Barnes, the United States Supreme Court reviewed a statute which was, as the majority herein states, "strikingly similar" to the ordinance sub judice.[1] The critical

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[1] The ordinance in Barnes provided:

Sec. 1. (a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of another person;

commits public indeceny [sic], a Class A misdemeanor.

(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

The ordinance at issue in the matter sub judice is excerpted in footnote two of the Majority Opinion.

issue in Barnes was the characterization of the purpose of the statute, for if the purpose of a statute is the suppression of protected expression, then under prevailing First Amendment precedent, the strict scrutiny test applies.

According to the majority in the instant matter, there was "no point on which a majority of the Barnes Court agreed," aside from agreeing that nude dancing is expressive conduct for First Amendment purposes. Maj. Slip Op. at 10. Thus, the majority gleans that Barnes is not binding precedent on the issue of whether the ordinance sub judice can be characterized as relating to the suppression of free expression under the First Amendment. Finding no such binding precedent in Barnes, the majority proceeds to determine that the ordinance at issue here is related to the suppression of free expression, and further finds that the ordinance fails to pass constitutional muster under the strict scrutiny test. I believe that the majority herein strains to find discord in Barnes where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent.

My disagreement with the majority centers on the fact that five Justices, and thus a majority, voted to uphold the ordinance in Barnes on the basis that the ordinance at issue in Barnes could not be characterized as relating to the suppression of free expression for purposes of the First Amendment.

Therefore, a five-Justice majority declined to apply the strict scrutiny test.

The plurality opinion, authored by Chief Justice Rehnquist and joined by Justices Kennedy and O'Connor, stated: ". . . the public indecency statute furthers a substantial government interest in protecting order and

morality. This interest is unrelated to the suppression of free expression." Barnes, supra, 501 U.S. at 569 (emphasis added).

In a separate concurrence, Justice Souter agreed with the majority that the statute was not aimed at the suppression of free expression, and therefore also declined to apply strict scrutiny. Id. at 586 (Souter, J., concurring) ("the [state's] interest is unrelated to the suppression of free expression") (emphasis added). Justice Souter simply disagreed with the majority as to what purpose the statute was in fact serving, believing that purpose to be the prevention of prostitution, sexual assaults and other criminal activity, rather than the general interest in morality asserted by the majority. Id.

Finally, in another separate concurrence, Justice Scalia agreed with the plurality and Justice Souter that the purpose of the statute was *not* the suppression of protected free expression. Justice Scalia wrote separately because he did not believe that the "public nudity" proscribed by the statute was entitled to any First Amendment protection at all since it was not "expressive" behavior which would fall within the protective ambit of the First Amendment. However, Justice Scalia agreed with the plurality regarding the underlying purpose of the statute:

> The purpose of the Indiana statute, as both its text and the manner of enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified. Since that is so, the dissent has no basis for positing that, where only thoroughly edified adults are present, the purpose must be

repression of communication.

Id. at 575 (Scalia, J., concurring) (emphasis added). Thus, while Justice Scalia did not entirely endorse the plurality's reasoning, he also did "not think the plurality's conclusions differ greatly from my own." Id. at 579.[2]

Thus, the basic premise upon which five Justices of the United States Supreme Court agreed is that the purpose of a statute virtually identical to the one at issue here cannot be characterized as the suppression of protected expression.[3] Accordingly, none of these five Justices believed that the strict scrutiny test was appropriate. The majority herein overlooks this fact, deems the Barnes Court "hopelessly fragmented" and discerns no binding common ground in Barnes. Consequently, the majority adopts the position of the Barnes dissenters, finds the ordinance at issue a content-based ordinance which is aimed at the suppression of protected expression and applies the strict scrutiny test. By applying the First Amendment strict scrutiny test in spite of Barnes, the majority here defies binding precedent.

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[2] Notwithstanding Justice Scalia's belief that his own concurrence did not depart significantly from the plurality's position, the majority of this Court confidently asserts that Justice Scalia arrived at his conclusion by a "t[illegible]cally different route" than that taken by the Barnes plurality. Regardless of whether Justice Scalia's concurrence is to be interpreted in accordance with Justice Scalia's clearly stated intent or interpreted as the majority herein characterizes it, the important point is that Justice Scalia, like the plurality and Justice Souter, clearly did not believe that the statute was aimed at the suppression of protected expression.

[3] The majority acknowledges that binding precedent can emanate from a fragmented Court when that Court can be said to be in agreement on a given concept. See Maj. Slip Op. at 9.

Although I believe that Sections 1 (c) and 2 of the Ordinance at issue here do not fail under the First Amendment in light of Barnes, I nevertheless concur in the result reached by the majority since I believe that those provisions must be stricken under Article I, § 7 of the Pennsylvania Constitution, which provides: ". . . The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty . . .".[sic] Pa. Const. Art. I, § 7. This Court has repeatedly determined that Article I, § 7 affords greater protection to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment. See William Goldman Theatres, Inc. v. Dana, 405 Pa. 83, 87, 173 A.2d 59, 61, cert. denied, 368 U.S. 897 (1961); Willing v. Mazzocone, 482 Pa. 377, 383, 393 A.2d 1155, 1158 (1978); Commonwealth v. Tate, 495 Pa. 158, 174, 432 A.2d 1382, 1390 (1981); Western Pennsylvania Socialist Workers v. Connecticut Gen. Life Ins., 512 Pa. 23, 37, 515 A.2d 1331, 1338 (1986); Insurance Adjustment Bureau v. Insurance Commissioner, 518 Pa. 210, 542 A.2d 1317 (1988).

I believe that the dissent authored by Justice White in Barnes is persuasive and that this Court should adopt it for purposes of interpreting Article I, § 7 of the Pennsylvania Constitution. As Justice white pointed out in Barnes, the position of the Barnes plurality -- that the purpose served by the ordinance at issue was to protect morals and public order rather than to suppress free expression -- is patently erroneous. Justice White wrote:

> The purpose of forbidding people to appear nude in parks, beaches, hot dog stands and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in

> theatres and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.
>
> . . . .
>
> This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the state permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts or ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication. The nudity element of nude dancing performances cannot be pigeonholed as mere "conduct" independent of any expressive component of the dance.

Barnes, supra, 501 U.S. at 590-592 (White, J., dissenting).

Justice White's dissent forcefully articulates the position which I believe that this Court should adopt for purposes of our interpretation of Article I, § 7 of the Pennsylvania Constitution. If the purpose of the ordinance,

as the plurality and Justice Scalia believed, was merely to "enforce the traditional moral belief that people should not expose their private parts indiscriminately,"[4] then the ordinance presumably would not allow people to display indiscriminately their private parts to innumerable relatives, friends, and others whom they care to invite into their homes. Since the ordinance does not prohibit such behavior, the moral justification must be deemed illusory. The true purpose of the ordinance, as applied to appellant and others similarly situated, is to prevent the customers in appellant's and like establishments from being exposed to the distinctive communicative aspects of nude dancing. One might call this a moral justification, insofar as the drafters of the ordinance seem to be expressing their moral condemnation of those citizens of the Commonwealth who are attracted to this distinct form of communication, but lawmakers cannot invoke the sword of morality specifically to attack a form of protected expression. The fact that this particular form of protected expression may not ascend to the level of a high art form is irrelevant.[5] Lawmakers may not categorically proscribe any form of protected expression simply because they are not at ease with its content.

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[4] Barnes, supra, 501 U.S. at 575 (Scalia, J., concurring).

[5] This concept was eloquently articulated by Justice Harlan: "It is largely because government officials cannot make principled decisions in this area that the Constitution leaves matters of taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). Or, put another way: "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some 'entertainment' with his beer or shot of rye." Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir. 1974), aff'd in part sub nom. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Accordingly, for purposes of Article I, § 7 of the Pennsylvania Constitution, I believe that the strict scrutiny test is appropriately applied in this case. I concur in the majority's application of the strict scrutiny test, as well as the remainder of the majority's disposition of this case.

Mr. Justice Zappala joins this concurring opinion.

Supreme Court, U.S.
FILED
APR 12 1999
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NO. 98-1161

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a/ KANDYLAND,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding. There are no parent companies or subsidiaries of respondent.

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The respondent, Pap's A.M., t/d/b/a Kandyland, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Pennsylvania's Opinion in this case. That Opinion is reported at 719 A.2d 273 (Pa. 1998).

STATEMENT OF THE CASE

On September 28, 1994 City Council of the City of Erie enacted Ordinance No. 75-1994 by a four-two vote. The Ordinance was signed into law by the mayor on September 30, 1994. The Ordinance provided criminal penalties for anyone appearing in a state of nudity in a public place. Public place was defined by the Ordinance to include any location "owned by or open to the general public." [1] The Ordinance excepted from the nudity prohibition any child under age 10 or a nursing mother exposing a breast so long as the breast feeding infant is under two years of age.[2]

On October 14, 1994 Pap's A.M. filed a complaint in equity with the Court of Common Pleas of Erie County, Pennsylvania. The Ordinance was challenged as being a violation of freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution, as being unconstitutionally overbroad, and as being a violation of the equal protection clauses of the

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[1] "Public Place" includes all outdoor places owned by or open to the general public, and all buildings and all enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theatres, dance halls, banquets halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

[2] Article 711(4)

Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Pennsylvania Constitution. The Ordinance was also challenged as constituting a taking under the United States and Pennsylvania Constitutions and as being a violation of Pennsylvania Preemption laws.

On December 21, 1994 a hearing was held before the Court of Common Pleas of Erie County, Pennsylvania. The respondent was joined by two theatrical companies, the Erie Playhouse and the Roadhouse Theater, in challenging the Ordinance. Pap's A.M. presented videotaped city council proceedings in which each member of the majority stated that he was supporting the Ordinance for morality considerations.[3] The City produced no evidence.

The Erie Playhouse and Roadhouse Theatre noted that they had presented productions such as "*Hair*" and "*Equus*" which contained nudity as proscribed by the ordinance. The theatres expressed concern that their ability to present future productions in the city would be chilled.[4] The City recognized that enforcement would be subjective but assured the Court that nudity would be permitted in some productions at the discretion of the City.[5]

On June 18, 1995 the Court of Common Pleas issued an Opinion and Order holding the statute unconstitutionally overbroad in violation of both the United States and Pennsylvania Constitutions. The Court did not reach the other issues raised by Pap's A.M..

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[3] See ***Pap's A.M. v. City of Erie***, 674 A.2d 338, 343 n. 10 (Pa.Cmwlth. 1996).

[4] *Id.* at 345 n. 13

[5] The City did not prosecute the Roadhouse Theatre for showing a performance of *Equus* after the enactment of the Ordinance. ***Pap's A.M., supra,*** 674 A.2d at 346.

The City subsequently filed a Notice of Appeal to the Commonwealth Court of Pennsylvania on May 27, 1996. The Commonwealth Court reversed the Order of the Court of Common Pleas. ***Pap's A.M. v. City of Erie,*** 674 A.2d 338 (Pa. Cmwlth. 1996). The Commonwealth Court held that the Ordinance was in violation of neither the United States nor Pennsylvania Constitutions.

Pap's A.M. subsequently filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On January 28, 1997 the Supreme Court of Pennsylvania granted the Petition limited to two issues: "Whether the Erie City Ordinance is unconstitutionally overbroad and whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pa. Constitution." ***Pap's A.M. v. City of Erie,*** 688 A.2d 168, 169 (Pa. 1997).

On October 21, 1998 the Supreme Court of Pennsylvania issued an Opinion and Order unanimously holding the Ordinance to be an unconstitutional infringement of freedom of expression. ***Pap's A.M. v. City of Erie,*** 719 A.2d 273 (Pa. 1998). The majority held that the Ordinance was in derogation of the First and Fourteenth Amendments to the United States Constitution. The majority did not reach the state constitutional issue. ***Pap's A.M., supra,*** at 281 n. 12. The concurring justices held that the Ordinance did not violate the First and Fourteenth Amendments but held that that Ordinance was in violation of Article I, Section 7 of the Pennsylvania Constitution.

The Supreme Court of Pennsylvania began its analysis by noting that the "act of dancing nude, with its intended erotic message, is an expressive act entitled to First Amendment protection." ***Pap's A.M., supra,*** at 276 The

Court noted that eight of the nine members of this Court had supported this position in ***Barnes v. Glen Theatre, Inc.,*** 501 U.S. 560 (1991). The Court then conducted a detailed analysis of the multiple opinions authored in ***Barnes*** and concluded that no rationale had garnered majority support. ***Pap's A.M., supra,*** at 278. The Supreme Court of Pennsylvania therefore conducted an independent examination of the First and Fourteenth Amendments and concluded that "the Ordinance is inextricably linked with the content-based motivation to suppress the expressive nature of nude dancing." ***Pap's A.M., supra,*** at 279. The Court stated that as the Ordinance's restrictions were content-based that a strict scrutiny analysis was required. The Court held that the Ordinance could not withstand strict scrutiny analysis and severed the offending provisions of the Ordinance, sections 1(c) and 2. The concurring justices joined the majority's strict scrutiny analysis but would have applied it on state constitutional rather than federal constitutional grounds.

REASONS WHY THE PETITION SHOULD BE DENIED

The City of Erie enacted the Ordinance at issue for the sole purpose of prohibiting nude dancing. The City candidly admitted that some public nudity would be permitted. In fact, the City allowed the public to view a production of *Equus* which contained full nudity after the enactment of the Ordinance.[6] The City further promised the mainstream theatres that additional productions involving nudity would be permitted at the discretion of the City government.

The City accuses the Supreme Court of Pennsylvania of "willfully" disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the

[6] ***Pap's A.M., supra,*** 674 A.2d at 346.

Constitution. This issue does not warrant review by this Court. There can be no question but that decisions of this Court interpreting the United States Constitution are binding on every Court in the nation. ***Oregon v. Haas,*** 420 U.S. 714, 719 (1975). Willful defiance of Supreme Court precedent is not an issue subject to debate or worthy of review. It is simply not acceptable. ***Jaffree v. Board of School Commissioners,*** 554 F.Supp. 1104 (S.D.Ala.1983), order stayed, 459 U.S. 1314 (1983) (Powell, Circuit Justice).

The Supreme Court of Pennsylvania did not disregard binding precedent. The Court conducted a detailed and painstaking evaluation of the multiple opinions in ***Barnes*** pursuant to this Court's ruling in ***Marks v. United States,*** 430 U.S. 188, 194 (1977) (a fragmented Court's holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…") The Pennsylvania Court discerned that a clear majority in ***Barnes*** agreed that "nude dancing is entitled to some First Amendment protection." ***Pap's A.M., supra,*** 719 A.2d at 278. The Court then analyzed the plurality and two concurring Opinions and concluded that no rationale commanded five votes. As the Court noted, the plurality Opinion authored by Chief Justice Rehnquist viewed the Indiana law as content-neutral because the law prohibited all public nudity. Chief Justice Rehnquist concluded that the law was constitutional in order to protect public morality. Justice Souter did not agree with Chief Justice Rehnquist's holding. Justice Souter utilized the secondary effects doctrine to conclude that the law was a content-neutral proscription against public nudity and nude dancing. Justice Scalia opined that nude dancing restrictions should not be analyzed pursuant to the First Amendment. The Pennsylvania Court therefore concluded that as there were not five votes for any one position that ***Barnes*** could not be considered as binding precedent.

The Supreme Court of Pennsylvania was obligated to review the Erie Ordinance and the evidentiary record. The Court held that the Erie Ordinance was content-based and that its purpose was "to impact negatively on the erotic message of the dance." ***Pap's A.M., supra,*** 719 A.2d at 279. In fact, the Erie Ordinance was explicitly enacted to target the type of nude dancing offered at Kandyland. The City repeatedly represented that other types of nude expression were acceptable such as the *Equus* production presented at the Roadhouse Theatre. The Pennsylvania Court viewed the Erie Ordinance as content-based as the only difference between nudity at Kandyland and nudity in *Equus* was the message conveyed by the dancer. As the Ordinance was clearly content-based the Supreme Court of Pennsylvania properly applied a strict scrutiny analysis.

Pap's A.M. recognizes that several lower courts have viewed Justice Souter's concurring opinion as binding precedent. ***Triplett Grille, Inc. v. City of Akron,*** 40 F.3d 129 (6th Cir. 1994); ***International Eateries of Am., Inc. v. Broward County,*** 941 F.2d 1157 (11th Cir. 1991). But ***cf. Nakatomi Investments, Inc. v. City of Schenectady,*** 949 F.Supp. 988 (N.D.N.Y. 1997). Even if one assumes that Justice Souter's concurring opinion is controlling the offending provisions of the Erie Ordinance must be stricken. The record reveals that the Ordinance was adopted for the protection of morality and not to combat alleged secondary effects. The City was not at all concerned about secondary effects. In fact, the City presented no evidence whatsoever that nude dancing caused any harmful effects. See ***Phillips v. Borough of Keyport,*** 107 F.3d 164, 175 (3rd Cir. 1997).

CONCLUSION

The Supreme Court of Pennsylvania did not willfully ignore ***Barnes***. The Court conducted a careful review of ***Barnes,*** applied it to the facts of this case and reached an

appropriate ruling. The City does not ask this Court to review ***Barnes.*** It suggests that the Supreme Court of Pennsylvania violated the Supremacy Clause. It is respectfully averred that even if one assumes *arguendo* that the Supreme Court of Pennsylvania misapplied ***Barnes*** that is not sufficient justification for granting *certiorari.* This case does not warrant review. The Petition should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

MOTION FILED
FEB 13 1999

No. 98-1161

In The
Supreme Court of the United States
October Term, 1998

CITY OF ERIE, et al.,
Petitioner,

v.

PAP'S A.M., t/d/b/a KANDYLAND,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF THE ERIE COUNTY CITIZEN'S COALITION AGAINST VIOLENT PORNOGRAPHY IN SUPPORT OF PETITIONER

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20pp

MOTION FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Amicus Curiae Erie County Citizen's Coalition Against Violent Pornography has sought the consent of the parties to participate in this matter by filing of the enclosed brief. A consent letter from the Petitioner, the City of Erie, is on file with the Clerk in accordance with Rule 37.3. However, the Respondent, PAP'S A.M., t/d/b/a/ Kandyland, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the Petitioner City of Erie, to inform the Court of the interests of the residents of the local community to maintain their ability to regulate public nudity on the grounds that the residents have made a moral decision to disallow public nudity in their community and to show how the decision in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991) has been ignored by the Pennsylvania Supreme Court to reach a decision that is inconsistent with this Court's prior decisions. Moreover, with the Pennsylvania Supreme Court's decision, there is now disagreement between lower courts interpreting this Court's holding in *Barnes*.

As set forth more fully in the "Interest of the Amicus Curiae" section of the attached brief, the Erie County Citizen's Coalition Against Violent Pornography is a group comprised of residents of Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography and public nudity, including nude dancing at business establishments like Kandyland. Under the ordinance passed by the City of Erie, dancers at establishments like Kandyland were not permitted to dance totally nude. The dancers were required to wear "pasties" and "G-strings" to avoid being nude under

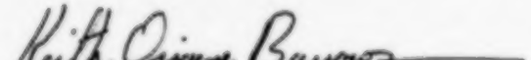
the ordinance. While the Coalition would have preferred to not have the dancing establishment in existence at all, the Coalition has recognized the complexities of the law and regarded the ordinance as a satisfactory regulation of pornography and public nudity. However, since the Pennsylvania Supreme Court's ruling that overturned the statute, the dancers at the club are now dancing in full nudity.

The experience of the Amicus Curiae of dealing with the nude dancing establishment both before and after the ordinance was enacted offers an important practical aspect and analytical perspective on the issues presented by this case. In the instant case, the Amicus Curiae has experience with the nude dancing establishment's secondary effects that the ordinance would help prevent if enforced. From the perspective of the amicus curiae, the question of whether the Court should grant certiorari and ultimately review the Pennsylvania Supreme Court's decision involves more than just a simple examination of *stare decisis* and application of this Court's decision in *Barnes v. Glen Theater, Inc. et al.* The issue for the Amicus Curiae involves the fundamental judgment of whether or not public nudity can be regulated by a local governing body on the basis of moral concerns of the community and the interest of preventing the harmful secondary effects that accompany such establishments.

Amicus Curiae thus has a direct and important interest in the review of this case by this Court, and has a valuable perspective to offer concerning the legal issues presented therein. Amicus Curiae therefore respectfully urges that the Court grant this Motion For Leave To File

Brief *Amicus Curiae* in Support of Petition For Writ of Certiorari.

Respectfully submitted,



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QUESTION PRESENTED

Whether a petition for writ of certiorari should be granted to the Pennsylvania Supreme Court in the instant case.

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INTEREST OF AMICUS CURIAE*

Amicus curiae, the Erie County Citizen's Coalition Against Violent Pornography is a non-profit organization domiciled in the Commonwealth of Pennsylvania, and located in Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography, including public nudity such as the type that is the subject of the instant case. The Coalition seeks to educate citizens in the legal and peaceful means available to them to oppose the spread of establishment of pornography in their communities.

The City of Erie attempted to regulate the public nudity at Kandyland by enacting an ordinance that required the dancers to wear modest coverings over parts of the female anatomy, commonly known as "pasties" and "G-strings." The City's ordinance was virtually identical to the Indiana statute this Court declared constitutional in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991), as not unduly restricting a dancer's First Amendment right to freedom of expression. Some of the dancers and the owner of Kandyland challenged the ordinance, and eventually succeeded in having the statute overturned by the Pennsylvania Supreme Court.

The members of the Coalition live in the vicinity of the nude dancing establishment operated by the Respondent in the instant case. Kandyland is located in a residential area, and as such has an impact on the residents that live in the community near Kandyland. Moreover, residents of the community near Kandyland have asked the members of the Coalition for assistance in dealing with the existence of

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* No other person other than Counsel of Record has contributed to the authoring of this brief, in whole or in part, and no person or entity other than amicus curiae has made a monetary contribution to the preparation or submission of this brief.

Kandyland in their neighborhood, as well as with dealing with the secondary effects that have accompanied Kandyland's operations. Thus, the resolution of the instant case will have a direct impact on the members of the Coalition and on their community at large as well.

Because the city's ordinance has been overturned by the Pennsylvania Supreme Court, the dancers at Kandyland have returned to dancing without any clothing in full public nudity. Thus, where the city's residents spoke through their council members to enact an ordinance restricting public nudity to a constitutionally permissible extent, the Pennsylvania Supreme Court has interjected an incorrect and untenable decision that ignores this Court's precedent to overturn the decision of the city council members. Amicus Curiae urges this Court to grant the petition for writ of certiorari in this case and to reverse the decision of the Pennsylvania Supreme Court.

SUMMARY OF ARGUMENT

PAP'S A.M. v. City of Erie, et al., 719 A.2d 273 (1998), was wrongly decided and should be overturned. The correct rule of law in this case is supplied by this Court's decision in *Barnes v. Glen Theater, Inc., et al.*, 501 U.S. 560 (1991), where this Court held that nude dancing may be regulated by statute so long as the statute meets the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

Prior to the Pennsylvania Supreme Court's decision in the instant case, other lower courts have abided by this Court's holding in *Barnes* and upheld similar statutory constructions that restrict nude dancing. However, now that the Pennsylvania Supreme Court has ignored the precedential value of the *Barnes* decision, a conflict exists between lower courts on the issue of constitutionally permissible regulation of nude dancing. This case presents an appropriate occasion for resolving the conflict, and this Court should grant the petition for writ of certiorari.

The Pennsylvania Supreme Court's decision in the instant case is simply incorrect. The Pennsylvania court recognized that a majority of this Court recognized that nude dancing may be regulated in accordance with the requirements of *O'Brien*, but the Pennsylvania court flatly ignored this Court's decision in *Barnes*. Instead, the Pennsylvania Supreme Court applied the rationale of the dissent authored by Justice White in *Barnes* in order to find that the statute unreasonably restricted a dancer's First Amendment rights. This decision by the Pennsylvania Supreme Court has therefore turned the precedential value of this Court's decisions completely around, and in reverse.

Amicus curiae will make two broad points in this brief: First, that the Court should review this case and grant a writ of certiorari because a conflict exists among the lower courts as to the proper interpretation and application of this Court's decision in *Barnes*. Second, the statutory scheme endorsed by *Barnes* and used in the instant case is still a valid expression of a community's judgment to restrict public nudity and does not run afoul of the First Amendment. In making these points, we will argue the similarity of the instant case to the scenario this Court was presented with in *Barnes*.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT THAT EXISTS BETWEEN LOWER COURTS' APPLICATIONS OF THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*

The question presented at this stage in the proceedings in this case is whether the Court should grant a writ of certiorari to the Pennsylvania Supreme Court to review the decision in *PAP'S A.M. t/d/b/a/ Kandyland v. City of Erie, et al.*, 719 A.2d 273 (1998). Ultimately, the issue underlying the limited question of whether to grant the writ of certiorari is whether nude dancing can be regulated in the manner presented by the City of Erie's ordinance without unreasonably restricting a dancer's right to freedom of expression under the First Amendment.

Since this Court's decision in *Barnes v. Glen Theater, Inc., et al., supra*, it has been widely acknowledged that a government may regulate nude dancing by requiring minimal amounts of clothing to be worn by the dancer. This Court has not reversed the decision in *Barnes*, nor has there

been a significant challenge to *Barnes* since the decision, and thus *Barnes* represents this Court's ruling on the question of the regulation of nude dancing, and is the rule of law.

Lower courts have consistently made decisions in accordance with *Barnes* since 1991, at least until the Pennsylvania Supreme Court's decision in the instant case.[1] Perhaps most important is that the United States Court of Appeals for the Third Circuit has held that *Barnes* is the authority on the regulation of nude dancing in *Mitchell v. Commonwealth Adult Entertainment Establishment of Delaware*, 10 F.3d 123 (3rd Cir. 1993). Thus, not only is there a conflict amongst the other federal courts and the Pennsylvania Supreme Court in this area of the law, there is a direct conflict between the highest appellate authority in Pennsylvania and the Court of Appeals for the Third Circuit, which has as part of its jurisdiction, the Commonwealth of Pennsylvania.

A. *Barnes v. Glen Theater, Inc, et al.*, Established The Legal Boundaries For The Regulation Of Nude Dancing

This Court's holding in *Barnes* is the rule of law concerning questions involving the regulation of public nudity, and hence nude dancing. The *Barnes* decision held that nude dancing may be regulated by statute so long as

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[1] See *Café 207 Inc., v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam* 66 F. 3d 272 (11th Cir. 1995), *cert. denied* April 17, 1996; *SBC Enterprises and Shawn B. Cliche v. City of South Burlington*, 892 F. Supp. 578 (D.C. Vt. 1995); *O'Malley v. City of Syracuse*, 813 F. Supp. 133 (N.D. N.Y. 1993); *Déjà Vu of Nashville Incorporated, et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, (Mem Opin. And Order, M.D. Tenn. June 30, 1994); *Triplett Grille Inc. v. Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993) *aff'd* 40 F. 3d 129 (6th Cir. 1994).

the statute meets the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968).

The *Barnes* case involved a statute enacted by the Indiana legislature that provided that a person committed a misdemeanor if they appeared nude in public.[2] The statute was challenged by two establishments that desired to provide totally nude dancing as entertainment, and individual dancers at the establishments that desired to dance totally nude for customers. The challenge was based on the argument that the First Amendment's guarantee to freedom of expression prevented the State of Indiana from enforcing the prohibition against full nudity, and as applied to the respondents, from providing totally nude dancing.

The Court applied the four-part analysis of *O'Brien* to reach its result. First, examining the statute's history and purpose, the Court found that statute was "designed to protect public morals and public order." *Barnes* at 569. Thus, the statute was within the constitutional power of the State as part of the traditional police power of the State. *Barnes* at 569. Secondly, in accordance with *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) and *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court found that the statute "further[ed] a substantial government interest in protecting order and morality." *Barnes* at 569. Third, the Court found that the government's interest in protecting

[2] Indiana Code § 35-45-4-1 (1988) provided: "Public indecency; indecent exposure. Sec. 1. (a) A person who knowingly or intentionally, in a public place: (1) engages in sexual intercourse; (2) engages in deviate sexual conduct; (3) appears in a state of nudity; or (4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor. (b) 'Nudity' means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state."

order and morality was unrelated to the suppression of free expression, applying the analysis from *Dallas v. Stanglin*, 490 U.S. 19 (1989), where the Court refused to find that every activity contains a "kernel of expression," and that therefore any type of activity that contains any amount of expression is protected by the First Amendment. *Barnes* at 570. Thus, the court determined that the statute was unrelated to the suppression of free expression because public nudity was the "perceived evil" that the statute sought to address, not nude dancing. *Barnes* at 571. Finally, the Court held that the incidental restriction on the First Amendment freedom of the respondents was narrowly tailored and was the bare minimum necessary to achieve the State's purpose. *Id.* at 572. Thus the Court rejected the respondent's claims and held that the statute was a proper exercise of the State's police power and that it met the four-prong test enunciated in *O'Brien, supra*.

This Court has not overturned the *Barnes* decision, not has it greatly expanded upon the underlying analysis upon which *Barnes* is based. Therefore, *Barnes* is for all intents and purposes, the rule of law in a case involving the regulation of public nudity as applied to nude dancing, and the lower courts subject to the oversight of the Court are bound by the decision.

B. The Lower Court's Decision Below Creates A Conflict With Other Courts That Have Previously Applied *Barnes v. Glen Theater, Inc., et al.*, To Uphold The Regulation Of Nude Dancing

Since this Court's decision in *Barnes*, there have been several decisions by lower courts considering the regulation of nude dancing. All of the decisions prior to the Pennsylvania Supreme Court's decision have recognized the

authority of the *Barnes* plurality decision as the rule of law. The courts have not always upheld the regulation of public nudity, but they have all recognized that *Barnes* was this Court's expression of the law on the issue and was therefore binding.

In *Mitchell v. Commonwealth Adult Entertainment Establishment of Delaware*, 10 F.3d 123 (3rd Cir. 1993), the court considered a Delaware ordinance that regulated nude dancing by requiring dancing booths to be open to the public portions of an adult bookstore. The court applied the *Barnes* decision in upholding the statute's regulation of nude dancing. The court noted the statute's purpose in ameliorating the secondary effects of nude dancing and quoted from the *Barnes* decision as authority for upholding the statute as constitutional.

In *Triplett Grille Inc. v. Akron*, 816 F. Supp. 1249 (N.D. Ohio 1993) *aff'd* 40 F. 3d 129 (6th Cir. 1994), the court applied the *Barnes* decision and rationale in considering an ordinance passed by the City of Akron, Ohio. Although the court found the ordinance unconstitutional, it did so because the ordinance lacked the requisite basis in preventing secondary effects from nude dancing, as enunciated in Justice Souter's concurring opinion in *Barnes*. Although the court failed to uphold the particular ordinance, the court recognized that the *Barnes* decision was the authoritative statement of the law on the issue.

In *Café 207 Inc., v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd per curiam* 66 F. 3d 272 (11th Cir. 1995), *cert. denied* April 17, 1996, the district court considered whether an ordinance that was more restrictive than the ordinance in *Barnes* and the instant case violated the First Amendment's protections. The ordinance at issue required more clothing than just "pasties" and "G-strings."

The court upheld the ordinance against a challenge that the ordinance was overbroad and vague. The court rejected those claims, finding that the ordinance contained legislative intent similar to the intent found in the ordinance enacted in Erie, Pennsylvania.

In *SBC Enterprises and Shawn B. Cliche v. City of South Burlington*, 892 F. Supp. 578 (D.C. Vt. 1995), the court upheld an ordinance similar to the ones enacted in *Barnes* and the instant case as constitutional. The court acknowledged the *Barnes* decision as the final word on the issue of regulation of nude dancing as far as the U.S. Supreme Court was concerned.

In *O'Malley v. City of Syracuse*, 813 F. Supp. 133 (N.D. N.Y. 1993), the court considered an ordinance passed by the City of Syracuse that was similar to the *Barnes* ordinance. In similar fashion to the cases cited above, the court recognized the *Barnes* plurality decision as authority and upheld the regulation of nude dancing against constitutional challenges.

Finally, the District Court for the Middle District of Tennessee considered a similar ordinance in *Déjà Vu of Nashville Incorporated, et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, (Mem. Opin. and Order, M.D. Tenn. June 30, 1994). In that decision, the court upheld an statute's regulation of nude dancing as constitutional, relying on *Barnes*.

With the Pennsylvania Supreme Court's decision below, there now exists a conflict among lower courts as to the applicability of this Court's decision in *Barnes*. The Court is urged to grant the petition for a writ of certiorari to resolve the conflict the Pennsylvania Supreme Court's decision has created.

II. THE LOWER COURT IGNORED THIS COURT'S HOLDING IN *BARNES V. GLEN THEATER, INC., ET AL.*, TO REACH A DECISION INHERENTLY IN CONFLICT WITH THE PRIOR DECISIONS OF THS COURT

The Pennsylvania Supreme Court went to great lengths to circumvent this Court's holding and rationale in *Barnes*. In order to effect its circumvention, the court below first determined that the *Barnes* decision was a "hodgepodge" of decisions, and that "no clear precedent ar[ose] out of *Barnes* on the issue of whether the Ordinance in the matter sub judice passe[d] muster under the First Amendment." *Erie* at 278. The court determined that because *Barnes* was a plurality decision, it undertook the tack of determining if any of the various opinions in *Barnes* commanded a majority of the votes by the Court. Finding none, and thus finding no precedential authority in the plurality or concurring opinions in *Barnes*, the court instead found Justice White's dissent to be authoritative. *Id.*

In striking out on its own analysis, the court below embraced Justice White's dissent to find that the ordinance in Erie was content-based, despite the fact that the plurality opinion in *Barnes* determined that essentially the same ordinance was not content-based. *Erie* at 279. The court quoted from Justice White's dissenting opinion, which is at direct odds with the Court's own opinion in *Barnes*:

> it cannot be [said] that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of communication.

Id. (citing *Barnes* at 592). However, the Pennsylvania court's application of this particular portion of Justice White's dissent is at direct odds with the plurality opinion wherein it found that the Indiana statute did not apply to nude dancing because of the erotic message conveyed by the dancers, but rather it applied the statute to all forms of public nudity, not just nude dancing. *Barnes* at 571. Such an analysis by the Pennsylvania Supreme Court, if left to stand, can only lead to further confusion and incongruence among lower courts. It is fundamental that the United States Supreme Court is the final authority on matters of constitutional construction, and it does not need repeating by the Amicus Curiae. Nevertheless, the Pennsylvania Supreme Court has determined that it can strike out on its "own independent analysis" when the United States Supreme Court precedent does not meet with its liking. *Erie* at 280.

Having found that the Erie ordinance was content-based, the Pennsylvania Supreme Court embarked upon the erroneous application of the strict scrutiny test, which is required for a content-based regulation to pass constitutional muster. *Erie* at 279-80. Once the court was in the arena of a strict scrutiny analysis, it no longer had to deal with the uncomfortable analysis of *Barnes* because the *Barnes*

decision was based on application of the four-prong test of *United States v. O'Brien, supra.*

In applying the strict scrutiny test, the court noted that the appellees, the City of Erie, had not presented a strict scrutiny analysis in their briefs to the court, and that such a failure was alone justification for finding that the strict scrutiny test was not met. *Erie* at 280. How the court could have made such an incomprehensible argument is beyond fathom, because the failure to present a strict scrutiny analysis was due to proper reliance on this Court's holding and analysis in *Barnes*. It is apparent to Amicus that several other lower courts had recognized that *Barnes* was the rule of law as far as these issues were concerned, yet the Pennsylvania Supreme Court missed that point. The strict scrutiny analysis should not have been addressed by the Pennsylvania Supreme Court at all, yet it is precisely what the court determined the outcome of the case upon, in direct contravention of this Court's precedent.

The Pennsylvania court ultimately found that the Erie ordinance failed because the ordinance was not narrowly tailored to meet the state's compelling interest. The court held that the ordinance could have contained other restrictions on the social ills the ordinance aimed to prevent without regulating the expressive conduct of the nude dancing in question. However, because the court's analysis in applying the strict scrutiny test was inherently flawed in the first instance, its conclusion is similarly flawed and erroneous.

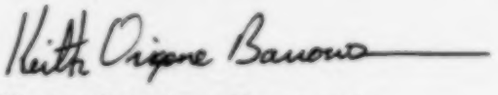
The inherent flaws in the Pennsylvania Supreme Court's decision cry out for reversal by this Court. This Court cannot let stand a decision by the highest court of a State that flagrantly defies clearly applicable precedent. The Pennsylvania Supreme Court's decision was not based upon

an arguable extension of the law or a colorable interpretation of United States Supreme Court precedent. Rather, it was fashioned upon "independent analysis" after flagrant circumvention, of the *Barnes* decision, followed by application of the rationale of a dissenting opinion. Such an application of a higher court's decisions cannot stand, and should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,



KEITH ORIGENE BARROWS
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(4)

Supreme Court, U.S.
FILED
JUN 4 1999
OFFICE OF THE CLERK

NO. 98-1161

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a/ KANDYLAND,

Respondent.

On Writ of Certiorari
To the Supreme Court of Pennsylvania

RESPONDENT'S MOTION TO DISMISS AS MOOT

Philip B. Friedman, Esquire
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319 West 8th Street
Erie, Pennsylvania 16502
(814) 452-3069
Counsel for Respondent

3PP

RESPONDENT'S MOTION TO DISMISS AS MOOT

Pursuant to Rule 21.2(b), Respondent moves to dismiss the Writ of Certiorari as moot.

STATEMENT OF FACTS

Relevant facts relied upon by Respondent on this Motion.

Respondent was the owner of a nude dancing club known as Kandyland. Respondent's business was located at 1402 State Street, Erie, Pennsylvania.

Respondent no longer operates a nude dancing club at any location. Kandyland is no longer in business. The former Kandyland location is now a comedy club. No nude dancing occurs on those premises. The outcome of this case will have no effect upon Respondent.

ARGUMENT

Article III of the Constitution requires the existence of a case or controversy in order for the Court to exercise jurisdiction. ***DeFunis v. Odegaard,*** 416 U.S. 312, 317 (1974). As the Court stated:

> "The starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' ***North Carolina v. Rice***, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). The inability of the federal

judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' ***Liner v. Jafco, Inc.,*** 375 U.S. 301, 306 n. 3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964); see also ***Powell v. McCormack***, 395 U.S. 486, 496 n. 7, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969); ***Sibron v. New York***, 392 U.S. 40, 50 n. 8, 88 S.Ct. 1889, 1896, 20 L.Ed.2d 917 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' 82 Wash.2d 11, 23 n. 6, 507 P.2d 1169, 1177 n. 6 (1973), the fact remains that under Art. III '(e)ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.' ***North Carolina v. Rice, supra***, 404 U.S., at 246, 92 S.Ct., at 404." (416 U.S. at 317)

In ***Board of License Commissioners of the Town of Tiverton v. Pastore,*** 469 U.S. 238 (1985) the Court was advised at oral argument that the Respondent-licensee had gone out of business. The Court dismissed the Writ as moot.

CONCLUSION

Respondent no longer operates a nude dancing club. Kandyland is no longer in business. A decision by this Court will have no effect upon Respondent. The Writ of Certiorari should be dismissed as moot.

Respectfully Submitted,

AMBROSE, FRIEDMAN and WEICHLER

By _____

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Erie, Pennsylvania 16502
814/452-3069
Pa. Supreme Court ID#27554

Supreme Court, U.S.
FILED
JUN 18 1999
CLERK

(6)

NO. 98-1161

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a/ KANDYLAND,

Respondent

On Writ of Certiorari
To the Supreme Court of Pennsylvania

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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R. Stern, E. Gressman, S. Shapiro, & K. Geller, ***Supreme Court Practice*** 721 (7th Ed. 1993)---------- 3

I. STATEMENT OF FACTS

Pap's A.M. is a Pennsylvania corporation. The stock of Pap's A.M. is and has been owned exclusively by Nick Panos of Erie, Pennsylvania.[1] Mr. Panos is the President of Pap's A.M. Pap's A.M. was the owner and operator of an establishment known as Kandyland which was located at 1402 State Street, Erie, Pennsylvania. On October 14, 1994 Pap's A.M. brought an action challenging the Erie Ordinance which is the subject of this case.

In 1998 Pap's A.M. ceased to provide entertainment in the form of nude dancing. The building in which Kandyland was located was sold to a real estate developer who extensively remodeled the building and opened a comedy club. The comedy club does not provide nude dancing nor do Pap's A.M. or Mr. Panos have any interest in that business.

Kandyland no longer exists. Neither Mr. Panos nor Pap's A.M. has any current financial or other interest in any establishment featuring nude dancing. Neither Mr. Panos nor Pap's A.M. has any interest in "Kandy's Dinner Theatre." Mr. Panos, by affidavit, has indicated that neither he personally nor Pap's A.M. has any intention of operating or owning an establishment featuring nude dancing in the future.

II. RESPONDENT'S STATUS AS A VIABLE CORPORATION UNDER PENNSYLVANIA CORPORATION LAW IS NOT A DETERMINATIVE FACTOR

---

[1] Attached hereto as Respondent's Exhibit 1 is an affidavit provided by Nick Panos.

The parties agree that Kandyland no longer exists and that Respondent is no longer in the business of providing entertainment in the form of nude dancing. The City contends that this Court should resolve the mootness question by reviewing Pennsylvania's Business Corporation Law (15 Pa.C.S.A. §101 et seq.) to determine whether Respondent has the capacity to sue or be sued.[2] It is respectfully averred that whether or not Pap's A.M. continues to exist as a corporate entity is of no significance to the resolution of the mootness question.

The absence of a controversy is jurisdictional. Article III, Section 2 of the Constitution requires a "case-or-controversy... through all stages of federal judicial proceedings, trial and appellate ..." ***Spencer v. Kemna,*** 523 U.S. 1 (1998). Whether the individual party is an existing person or corporate entity is not determinative.

III. THE CASE DOES NOT FALL WITHIN THE "CAPABLE OF REPETITION, YET EVADING REVIEW" EXCEPTION

The City contends that this case falls within the "capable of repetition, yet evading review" exception, citing ***Weinstein v. Bradford***, 423 U.S. 147 (1975).[3] The City's argument is misplaced.

In ***Spencer v. Kemna, supra,*** the Court stated:

> "[T]he capable- of-repetition doctrine applies only in exceptional situations," *Lyons, supra*, at 109, 103 S.Ct. at 1669, "where the following two circumstances [are] simultaneously present: '

[2] Petitioner's Brief in Opposition, p. 2
[3] Petitioner's Brief in Opposition, pgs. 4-5

> "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again,"

As in ***Spencer, supra,*** and in ***Weinstein, supra,*** the petitioner has not satisfied either condition.

This case does not present an issue involving a challenge to action too short in duration to be fully litigated. Establishments featuring nude dancing can exist indefinitely. Furthermore, there is nothing to suggest that Respondent will again seek to provide nude dancing. Mr. Panos has indicated by affidavit that he and Respondent have no such intention. The City's "speculative contingencies" afford no basis for invoking the exception. ***Board of License Com'rs of Town of Tiverton v. Pastore,*** 469 U.S. 239, 241 (1985) (quoting ***DeFunis v. Odegaard,*** 416 U.S. 312, 320 n. 5 (1974)).

IV. FEDERAL COURTS ARE WITHOUT JURISDICTION IN THE ABSENCE OF A CASE-OR-CONTROVERSY

Respondent has "no personal stake in the outcome" of this lawsuit. ***Spencer, supra.*** No decision on the merits will have an effect on Respondent's substantive rights. Article III of the Constitution requires the existence of a case-or-controversy in order for the federal judiciary to exercise judicial power. ***DeFunis, supra,*** 416 U.S. at 316 (quoting ***Liner v. Jafco, Inc.,*** 375 U.S. 301, 306 n.3 (1964)). The absence of a controversy is jurisdictional which cannot be waived by counsel or disregarded by stipulation. ***United States v. Alaska S.S. Co.,*** 253 U.S. 113, 116 (1920); R. Stern, E. Gressman, S. Shapiro, & K. Geller, ***Supreme Court Practice*** 721 (7th Ed. 1993).

Petitioner cites ***Mesquite v. Aladdin's Castle, Inc.,*** 455 U.S. 283, 289 n. 10 (1982) for the general rule that mere "voluntary cessation of allegedly illegal conduct does not moot a case..." Although Respondent does not disagree with this general rule it is not applicable to the current case.

In ***Mesquite, supra,*** the City of Mesquite eliminated an ordinance restriction while the case was pending in the Court of Appeals. This Court noted that the city could and indeed did intend to reenact the offending legislative provision if the case were declared moot. The Court elected to decide the case on the merits.

The City, relying upon ***Mesquite, supra,*** requests the Court to deny the mootness challenge because the City has not voluntarily abandoned the Ordinance.[4] The City further suggests that there is a "public interest in having the issue settled."[5]

It is respectfully averred that the City's continued support of the Ordinance is of no jurisdictional value. There may be a public interest in having the issue settled. However, the Court is jurisdictionally limited by Article III. There are and will be other cases raising similar if not identical issues which will be subject to the Court's discretionary review.[6]

The Court's decisions in ***DeFunis, supra,*** and ***Tiverton, supra,*** are controlling. Respondent is out of business and has no intent to reenter the business. Its location has been sold. It has no employees. The Writ of Certiorari should be dismissed as moot.

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[4] Petitioner's Brief in Opposition, p. 5
[5] Petitioner's Brief in Opposition, p. 6
[6] See e.g. ***Sammy's of Mobile v. City of Mobile,*** No. 98-994

V. RESPONDENT HAS AN OBLIGATION TO RAISE THE QUESTION OF MOOTNESS.

Counsel has a continuing duty to call to the Court's attention, without delay, facts that may deprive the Court of jurisdiction. ***Arizonans for Official English v. Arizona,*** 520 U.S. 43, 117 S.Ct. 1055, 1069 n. 23 (1997) quoting ***Tiverton, supra,*** 469 U.S. at 240. In ***Tiverton, supra,*** the Court was not advised that the licensee had gone out of business until oral argument.

Respondent's counsel advised the Court of the potential mootness issue immediately upon becoming aware of the circumstances. Counsel would certainly have raised the matter in Respondent's Brief in Opposition had he been made aware of the circumstances. There would have been no reason not to advise the Court at that time.

Respondent does not raise the mootness issue as a "belated attempt to avoid review" as suggested by the City. Respondent has an affirmative duty to advise the Court of all developments which occur at any time regarding the jurisdiction of the Court. ***Tiverton, supra.***

The City requests that if this Court finds that the case has become moot, that the Court vacate the judgment of the Supreme Court of Pennsylvania and remand with a direction to dismiss. Respondent avers that the appropriate action would be to vacate the judgment below and remand for such proceedings as the State Court may deem appropriate. ***Defunis, supra,; Riley v. International Brotherhood of Teamsters,*** 336 U.S. 930 (1949).

VI. RESPONDENT'S OVERBREADTH CHALLENGE IS OF NO SIGNIFICANCE

Pap's A.M. challenged the Erie Ordinance as being constitutionally overbroad. The Supreme Court of Pennsylvania did not address the overbreadth challenge. ***Pap's A.M. v. City of Erie***, 719 A.2d 273, 281 n. 12 (Pa. 1998). The City did not present an overbreadth issue in its Petition for Writ of Certiorari.

The City cites ***Broadrick v. Oklahoma,*** 413 U.S. 601 (1973) for the proposition that a liberal standing standard will be applied in First Amendment areas. The City cites no case in support of its contention that the liberal standing rule applicable in overbreadth challenges would overcome a lack of any stake in the outcome of the case. Furthermore, even assuming *arguendo* that an overbreadth challenge could be considered, the issue presented by the City for review would still be considered moot. See e.g. ***University of Texas v. Camerisch,*** 451 U.S. 390, 394 (1981).

CONCLUSION

For the foregoing reasons, the Respondent's Petition to Dismiss as Moot should be granted.

Respectfully Submitted,

Philip B. Friedman, Esquire
319 West 8th Street
Erie, Pennsylvania 16502
814/452-3069
Counsel for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF ERIE

Before me, a notary public, in and for said County and State personally appeared Nick Panos, who being duly sworn according to law deposes and states as follows:

I, Nick Panos, reside at 2410 Clark Road, Erie, Pennsylvania. I am the president and sole shareholder of Pap's A.M., Inc., a Pennsylvania corporation. (hereinafter "Pap's") Pap's was the owner and operator of a club which featured nude dancing known as Kandyland which was located at 1402 State Street, Erie, Pennsylvania. I am and have always been the sole shareholder of Pap's.

Pap's ceased to do business as Kandyland in 1998. The former location of Kandyland, 1402 State Street, Erie, Pennsylvania, was sold to an independent developer in 1998. The location is now a comedy club and does not feature nor present nude dancing. Neither I personally nor Pap's has any interest in the comedy club located at 1402 State Street.

I am 72 years of age. Neither Pap's nor I employ any individuals involved in the nude dancing business. Neither I nor Pap's maintain any contacts in the adult entertainment business. Neither I nor Pap's has any current interest in any establishment providing nude dancing. Neither I nor Pap's has any intention to own or operate a nude dancing establishment in the future.

RESPONDENT'S EXHIBIT 1

Pap's has not yet filed for dissolution but operates no active business. It is a "shell" corporation. A decision on the merits of this case will have no effect upon Pap's or upon me personally.

Nick Panos

Nick Panos

Sworn to and subscribed before
me this 15 day of June, 1999.

Karen A. Lombardo

NOTARIAL SEAL
KAREN A. LOMBARDO, NOTARY PUBLIC
ERIE, ERIE COUNTY, PENNSYLVANIA
MY COMMISSION EXPIRES JAN. 8, 2002

No. 98-1161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

V.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 16, 1999
CERTIORARI GRANTED MAY 17, 1999

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COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA

1994-60059 PAP'S AM, AL (vs) THE CITY OF ERIE, AL

Reference No:	Filed: 10/14/1994
Case Type: EQUITY	Time: 2:41
Judgment: .00	Execution Date 0/00/0000
Judge Assigned:	Jury Trial. . . .
Disposed Desc.:	Disposed Date. 0/00/0000
–Case Comments –	Higher Crt. 1.: 445 CD 1995 Higher Crt 2. :

General Index		Attorney Info
PAPS AM 1402 STATE STREET ERIE PA 16501	PLAINTIFF	FRIEDMAN PHILIP B, ESQ
KANDYLAND 1402 STATE STREET ERIE PA 16501	PLAINTIFF	FRIEDMAN PHILIP B, ESQ
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SAVOCCHIO JOYCE A 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD J, ESQ
MARAS CHRIS E 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD J, ESQ

BAGNONI MARIO S 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD J, ESQ
BRABENDER ROBERT C 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD J, ESQ
ROBISON DENISE 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD J, ESQ
THOMPSON JAMES N 626 STATE STREET ERIE PA 16501	DEFENDANT	KARLE GREGORY A, ESQ VILLELLA GERALD A, ESQ

Date	Entries
• • • •	
10/14/1994	COMPLAINT IN EQUITY W/ NOTICE TO PLEAD WITHIN TWENTY (20) DAYS. F/FRIEDMAN, ESQ
10/17/1994	PETITION FOR PRELIMINARY AND OR SPECIAL INJUNCTION: F/PHILIP B FRIEDMAN ESQ W/ RULE: RETURNABLE OCT 19, 94 AT 10 AM. S/MICHAEL T JOYCE, J
• • • •	
10/21/1994	OPINION AND ORDER: AND NOW, TO-WIT, THIS 21ST DAY OF OCTOBER, 1994, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT THE PLAINTIFF'S

	REQUEST FOR PRELIMINARY INJUNC-TION IS DENIED. S/GEORGE LEVIN, J. NOTICE WAS GIVEN TO EACH PARTY/ COUNSEL OF RECORD BY ORDINARY MAIL ON 10/21/94.
• • • •	
12/14/1994	ORDER DTD 12-12-94 IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT THE HEARING AND ARGUMENT IN THE ABOVE ENTITLED CASE IS RE-SCHEDULED FOR 12-21-94 @ 2:30 PM AS OPPOSED TO 12-28-94. S/GEORGE LEVIN, J. NOTICE GIVEN TO EACH PARTY/ COUNSEL OF RECORD BY ORDINARY MAIL ON 12-13-94.
• • • •	
1/18/1995	OPINION AND ORDER DTD 1/18/95, PLAINTIFF'S COMPLAINT AND REQUEST FOR A PERMANENT INJUNC-TION IS HEREBY GRANTED. DEFEN-DANT, BY & THROUGH THEIR AGENTS, ARE BARRED FROM ENFORCIN[ ] ORDI-NANCE 75-1994 & SAID ORDINANCE IS DECLARED UNCONSTITUTIONAL. PLAINTIFF'S REQUEST FOR ATTORNEY FEES IS DENIED. S/GEORGE LEVIN, J.
2/13/1995	NOTICE OF APPEAL TO COMMON-WEALTH COURT GIVEN BY ALL DEFEN-DANTS FROM ORDER DATED 1-18-95. THIS ORDER HAS BEEN ENTERED IN THE DOCKET AS EVIDENCED BY THE ATTACHED COPY; ORDER FOR TRAN-SCRIPT DIRECTED TO OFFICIAL COURT REPORTER TO PRODUCE CERTIFY AND FILE TRANSCRIPT IN THIS MATTER;

CERTIFICATE OF SERVICE OF FOREGOING NOTICE OF APPEAL ON 2-13-95 BY 1ST CLASS MAIL UPONP: [sic] PHILIP B FRIEDMAN ESQ, 319 W 8 ST, ERIE PA 16502; THOMAS AARON, CIVIL CT ADM, ERIE CO CRTHSE, ERIE PA 16501; HON GEORGE LEVIN, ERIE CO CRTHSE, ERIE PA 16501; OFFICE OF COURT STENOGRAPHER, ERIE CO CRTHSE, ERIE PA 16501. F/GREGORY A KARLE/GERALD J VILLELLA, ESQ

* * * *

2/14/1995 NOTICE OF APPEAL TO COMMONWEALTH COURT GIVEN BY PAP'S AM T/D/B/A KANDYLAND FROM ORDER ENTERED IN THIS MATTER DENYING COUNSEL FEES ON 1-18-95. THIS ORDER HAS BEEN ENTERED IN THE DOCKET AS EVIDENCED BY ATTACHED COPY. THE TRANSCRIPT HAS ALREADY BEEN ORDERED; SERVICE OF NOTICE OF APPEAL BY PERSONAL SERVICE ON 2-14-95 UPON: HON GEORGE LEVIN, ERIE CO CRTHSE, ERIE PA 16501; GERALD J VILLELLA ESQ, CITY SOLICITORS OFF, 505 MUNICIPAL BLDG., ERIE PA 16501; THOMAS AARON, CIVIL CT ADM, ERIE CO CRTHSE, ERIE PA 16501; GREGORY A KARLE ESQ, CITY SOLICITORS OFF, 505 MUNICIPAL BLDG, ERIE PA 16501; COURT REPORTERS OFF, ERIE CO CRTHSE, ERIE PA. F/PHILIP B FRIEDMAN, ESQ

* * * *

4/01/1996 IN THE COMMONWEALTH COURT OF PENNSYLVANIA NO. 445 AND 446 C.D.

1995 BEFORE: HON JOSEPH T DOYLE, HON DORIS A SMITH, JUDGES AND HON CHARLES P MIRARCHI JR, SR JUDGE. OPINION W/ ORDER DTD 3-27-96, THE ORDER OF THE COURT OF COMMON PLEAS OF ERIE COUNTY IS HEREBY REVERSED. S/JOSEPH T DOYLE, JUDGE

4/25/1996 SUPREME COURT OF PENNSYLVANIA NOTICE OF FILING PETITION FOR ALLOWANCE OF APPEAL FROM COMMONWEALTH COURT DKTS 445 & 446 C.D. 1995.

2/06/1997 IN THE SUPREME COURT OF PENNSYLVANIA ALLOCATUR NOTICE OF APPEAL DOCKET NO. 16 W.D. 1997 FROM CMMWLTH CT NO. 445 C.D. 1995.

IN THE SUPREME COURT OF PENNSYLVANIA ALLOCATUR NOTICE OF APPEAL DOCKET NO 17 W.D. 1997 FROM CMMWLTH CT NO. 446 C.D. 1995.

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT ORDER DTD 1-28-97, THE PETITION FOR ALLOWANCE OF APPEAL IS HEREBY GRANTED, BUT LIMITED TO THE FOLLOWING ISSUES: I. WHETHER THE ERIE CITY ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD; III. WHETHER THE ORDINANCE VIOLATES THE RIGHT

TO FREEDOM OF EXPRESSION AS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 7 OF THE PENNSYLVANIA CONSTITUTION. MADAME JUSTICE NEWMAN DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS MATTER. S/AMY J CERASO ESQ, DEP PRO.

12/09/1998 IN THE SUPREME COURT OF PA WESTERN DISTRICT @ NO. 016 & 017 DKT '97 OPINION BY MR JUSTICE CAPPY DTD 10-21-97.

12/09/1998 IN THE SUPREME COURT OF PA WESTERN DISTRICT @ NO. 016 & 017 CONCURRING OPINION BY MR JUSTICE CASTILLE DTD 10-21-98.

* * * *

COMMONWEALTH COURT DOCKET ENTRIES

0445 C.D. 1995 PAP'S A.M. v. THE CITY OF ERIE et al

APPEAL Erie FILED DATE: 02/14/95

AMOUNT PAID: 55.00 WAIVED: CASE TYPE: Civil Action Equity

APPLD ORDER DATE: January 18, 1995

CLOSE DATE: March 27, 1996

ALLOCATUR DOCKET #0230 WAL96

CONSOLIDATED/RELATED WITH NO.: C 0446CD95

LOWER COURT # 60059 OF 94 Honorable George Levin

DISPOSITION: Reversed DATE: March 27, 1996

PARTIES	
PAP'S A.M. t/d/b/a KANDYLAND	Appellant
THE CITY OF ERIE	
JOYCE A. SAVOCCHIO	
CHRIS E. MARAS	
MARIO S. BAGNONI	
ROBERT C. BRABENDER	
DENISE ROBISON	
JAMES N. THOMPSON	Appellee

COUNSEL	
Philip B. Friedman 814-452-3069 FAX: 27554 319 West 8th Street Erie PA 16502-1495	Appellant
Gerald J. Villella 814-870-1230 FAX: 32814 City Solicitor's Office 626 State Street Erie PA 16501	Appellee
Gregory A. Karle FAX: City Solicitor's Office 505 Municipal Building Erie PA 16501	Appellee
Witold J. Walczak 412-681-7864 FAX: 62976 American Cilvil[sic] Liberties 237 Oakland Avenue Pittsburgh PA 15213-4090	Amicus Cur

*** DOCKET ENTRIES ***

02/14/95 Petition for Review/Notice of Appeal Filed

Cross Notice of Appeal to 446 C.D. 95.

* * * *

02/28/95 Order Filed

The cross-appeals at 445 C.D. 1995 & 446 C.D. 1995 are sua sponte consolidated. Morgan, S.J. order exit 3-1-95.

* * * *

09/28/95 Argument Scheduled

Tuesday, November 14, 1995, in Pittsburgh.

* * * *

03/27/96 Opinion Filed

Reversed.

Doyle, J.
(25 pages)

01/28/97 Filed – Other

In the Supreme Ct., (From data sheet), PFAOA granted but limited to the following issues: I. Whether the Erie City Ordinance is unconstitutionally overbroad. III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the U. S. Constitution. (PC). See allocatur screen.

*** ALLOCATUR ***

ALLOC APPLICATION TYPE: Pet. Allow. of Appl.

APPLICATION DATE: April 23, 1996
ALLOC DKT#. 0230 WAL96

REC TO SPRM CT.: February 6, 1997
APPEAL DKT#: 00 16 WAP97

NOTE: Petition of PAP's A.M. t/d/b/a Kandyland. Granted

NOTE: (Limited) 01/28/97. See 01/28/97.

*** OPINION ***

FILED DATE: March 27, 1996 J: Joseph T. Doyle Judge

OPINION: PAN DATE ARG/SUB: November 14, 1995

OPINION TYPE: Majority – Reported

* * * *

*** CAPTION ***

PAP'S A.M. t/d/b/a KANDYLAND, Appellant
Appellant

v.

THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities

COMMONWEALTH COURT DOCKET ENTRIES

0446 C.D. 1995 THE CITY OF ERIE et al v. PAP'S A.M.
APPEAL Erie FILED DATE: 02/13/95
AMOUNT PAID: 55.00 WAIVED: CASE TYPE:
Civil Action Equity
APPLD ORDER DATE: January 18, 1995
CLOSE DATE: March 27, 1996
ALLOCATUR DOCKET #0231 WAL96
CONSOLIDATED/RELATED WITH NO.: C 0445CD95

LOWER COURT # 60059 OF 94 Honorable George Levin

DISPOSITION: Reversed DATE: March 27, 1996

PARTIES

THE CITY OF ERIE

JOYCE A. SAVOCCHIO

CHRIS E. MARAS

MARIO S. BAGNONI

ROBERT C. BRABENDER

DENISE ROBISON

JAMES N. THOMPSON — Appellant

PAP'S A.M. t/d/b/a KANDYLAND — Appellee

COUNSEL

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Gerald J. Villella — Appellant
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Erie PA 16501

Philip B. Friedman — Appellee
FAX:
319 West 8th Street
Erie PA 16502

*** DOCKET ENTRIES ***

02/13/95	Petition for Review/Notice of Appeal Filed
* * * *	
02/28/95	Order Filed
	The cross-appeals at 445 C.D. 1995 & 446 C.D. 1995 are sua sponte consolidated. Morgan, S.J. order exit 3-1-95.
* * * *	
09/28/95	Argument Scheduled
	Tuesday, November 14, 1995, in Pittsburgh.
* * * *	
03/27/96	Opinion Filed
	Reversed. Doyle, J. (25 pages)
01/28/97	Filed – Other

In the Supreme Ct., (from data sheet), PFAOA Granted But Limited to the following issues: I. Whether the Erie City Ordinance is unconstitutionally overbroad. III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the U. S. Constitution. (PC). See allocatur screen.

*** ALLOCATUR ***

ALLOC APPLICATION TYPE: Pet. Allow. of Appl.

APPLICATION DATE: April 23, 1996
ALLOC DKT#. 0231 WAL96

REC TO SPRM CT.: February 6, 1997
APPEAL DKT#: 0017 WAP97

NOTE: Petition of PAP's A.M. t/d/b/a Kandyland. Granted

NOTE: (Limited) 01/28/97. See 01/28/97.

*** OPINION ***

FILED DATE: March 27, 1996 J: Joseph T. Doyle Judge
OPINION: PAN DATE ARG/SUB: November 14, 1995
OPINION TYPE: Majority – Reported

---

* * * *

*** CAPTION ***

PAP'S A.M. t/d/b/a KANDYLAND

v.

THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities, Appellant
Appellants

SUPREME COURT OF PENNSYLVANIA

R: A/G/13728 **DOCKET NUMBER 0016 W.D. APPEAL DOCKET 1997** 05/26/99

PAP'S A.M. t/d/b/a KANDYLAND

APPELLANT

V.

THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic] and JAMES N. THOMPSON, in their official capacities

APPELLEES

Letter "X" indicates an Appended Docket: (X)

SEE NO.: 00 17 W.D. Appeal Docket 1997

SESSION DATA

ARGUED/SUBMITTED: (A)

JOURNAL NUMBER: 142/97 **DISPOSITION:** Reversed – 10/21/98

DATE ARGUED: 09/16/97

PARTIES ADVISED: 10/21/98

ORDER:

REARG. FILED: **REARGUED:** **REARG.J.NO.:**

DISPOSITION: -
PARTIES ADVISED:

ORDER:

RECORD REMITTED: 12/07/98 **DISPOSAL DATE:**

VOTE

AUTHOR: CAPPY, J.

FLAHERTY	-MO	ZAPPALA	-CIR
CAPPY	-MO	CASTILLE	-CO
NIGRO	-MO	NEWMAN	-DNP
SAYLOR	-MO		

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SUPERIOR/COMMONWEALTH COURT INFORMATION

NAME: COMMONWEALTH

DOCKET NUMBER: 0445 C.D. 95
DATE: 03/27/96 REARGUMENT DENIED:
JUDGE(S): DOYLE, Smith, Mirarchi, S.J., JJ.
ACTION: Order Reversed

TRIAL COURT/AGENCY INFORMATION

NAME: CCP COUNTY: Erie
NUMBER: 60059 of 1994 DIVISION: Civil
DATE: 01/18/95

JUDGE: Honorable Shad Collelly,[sic] A.J.
ACTION: Order entered
NOTICE OF APPEAL FILED: REARGUMENT DENIED:

SUPREME COURT INFORMATION

APPEAL FROM: Order of the Commonwealth Court at No. 0445 C.D. 95 entered 3/27/96 reversing the Order of the Court of Common Pleas of Erie County, Civil Division, at No. 60059 of 1994 entered 1/18/95

NATURE OF CASE: CONSTITUTIONALITY OF STATUTE
TYPE OF CASE: Granted Allocatur

NOTICE OF APPEAL FILED BELOW:

NOTICE OF APPEAL DOCKETED IN SUPREME COURT: 01/28/97

PROBABLE JURISDICTION NOTED:

ALLOCATUR ALLOWED: 01/28/97

AT NUMBER: 0230WAL96

ALLOCATUR DISPOSITION: AND NOW, this 28th day of January, 1997, the Petition for Allowance of Appeal is hereby GRANTED, BUT LIMITED to the following issues:

I. Whether the Erie City Ordinance is unconstitutionally overbroad.

III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United State [sic] Constitution and Article I, section 7 of the Pennsylvania Constitution.

Madame Justice Newman did not participate in the consideration or decision of this matter. PC

ARGUED/SUBMITTED: A

ORIGINAL RECORD FILED: 01/12/97
RECORD CONTENT: 3 Parts

* * * *

ADDITIONAL DOCKET ENTRIES

* * * *

10/21/98 – OPINION – The order of the Commonwealth [C]ourt below is reversed. Madame Justice Newman did not participate in the consideration or decision of this matter. Mr. Justice Castille file[ ] a concurring opinion in which Mr. Justice Zappala joins.

* * * *

[Undated] – Petition For a Writ Of Certiorari was filed in the United States Supreme Court January 19, 1999 and place[ ] on the docket January 21, 1999 as No. 98-1161.

05/19/99 Letter stating the United States Supreme Court granted certiorari, filed.

05/25/99 Received Original Record for the United State[ ] Supreme Court.

SUPREME COURT OF PENNSYLVANIA

R: A/G/13728 **DOCKET NUMBER 0017 W.D. APPEAL DOCKET 1997 05/26/99**

PAP'S A.M. t/d/b/a KANDYLAND

APPELLANT

V.

THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBINSON [sic] and JAMES N. THOMPSON, in their official capacities

APPELLEES

Letter "X" indicates as Appended Docket: (X)

SEE NO. 0016 W.D. Appeal Docket 1997

SESSION DATA

ARGUED/SUBMITTED: (A)

JOURNAL NUMBER: T42/97 **DISPOSITION:** Reversed – 10/21/98

DATE ARGUED: 09/16/97 **PARTIES ADVISED:** 10/21/98

ORDER:

REARG. FILED: REARGUED: **REARG.J.NO.:**
DISPOSITION: –
PARTIES ADVISED:

ORDER:

RECORD REMITTED: 12/07/98 **DISPOSAL DATE:**

VOTE

AUTHOR: CAPPY, J.

FLAHERTY	-MO	ZAPPALA	-CIR
CAPPY	-MO	CASTILLE	-CO
NIGRO	-MO	NEWMAN	-DNP
SAYLOR	-MO		

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SUPERIOR/COMMONWEALTH COURT INFORMATION

NAME: COMMONWEALTH
DOCKET NUMBER: 0446 C.D. 95
DATE: 03/27/96 REARGUMENT DENIED:
JUDGE(S): DOYLE, Smith, Mirarchi, S.J., JJ.
ACTION: Order Reversed

TRIAL COURT/AGENCY INFORMATION

NAME: CCP COUNTY: Erie
NUMBER: 60059 of 1994 DIVISION: Civil
DATE: 01/18/95
JUDGE: Honorable Shad Connelly, A.J.
ACTION: Order entered
NOTICE OF APPEAL FILED: REARGUMENT DENIED:

SUPREME COURT INFORMATION

APPEAL FROM: Order of the Commonwealth Court at No. 0446 C.D. 95 entered 3/27/96 reversing the Order of the Court of Common Pleas of Erie County, Civil Division, at No. 60059 of 1994 entered 1/18/95

NATURE OF CASE: CONSTITUTIONALITY OF STATUTE

TYPE OF CASE: Granted Allocatur

NOTICE OF APPEAL FILED BELOW:

NOTICE OF APPEAL DOCKETED IN SUPREME COURT: 01/28/97

PROBABLE JURISDICTION NOTED:

ALLOCATUR ALLOWED: 01/28/97
AT NUMBER: 0231 WAL96

ALLOCATUR DISPOSITION: AND NOW, this 28th day of January, 1997, the Petition for Allowance of Appeal is hereby GRANTED, BUT LIMITED to the following issues:

I. Whether the Erie City Ordinance is unconstitutionally overbroad.

III. Whether the Ordinance violates the right to freedom of expression as guaranteed by the First and Fourteenth Amendments to the United State [sic] Constitution and Article 1, section 7 of the Pennsylvania Constitution.

Madame Justice Newman did not participate in the consideration or decision of this matter. PC

ARGUED/SUBMITTED: A

ORIGINAL RECORD FILED: 02/12/97
RECORD CONTENT: 3 Parts

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* * * *

ADDITIONAL DOCKET ENTRIES

* * * *

10/21/98 –The order of the Commonwealth Court below is reversed. Madame Justice Newman did not participate in the consideration or

decision of this matter. Mr. Justice Castille files a concurring opinion in which Mr. Justice Zappala joins.

* * * *

[Undated] –Petition for A Writ of Certiorari was filed in the United States Supreme Court on January 19, 1999 and place[ ] on the docket January 21, 1999 as No. 98-1161.

05/19/99 Letter stating the United States Supreme Court granted certiorari, filed.

5/25/99 Received Original Record [for] the United States Supreme Court.

PAP'S A.M. t/d/b/a KANDYLAND	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
VS	:	
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES THOMPSON, in their official capacities	:	CIVIL DIVISION
	:	NO. 60059-1994

PARTIAL TRANSCRIPT OF INJUNCTION
(Start of hearing to start of videotape)

Proceedings held before the HONORABLE GEORGE LEVIN, in Courtroom C, Erie County Courthouse, Erie, Pennsylvania, on Wednesday, October 19, 1994, commencing at 10:15 a.m.

APPEARANCES:

PHILIP B. FRIEDMAN, Esquire, appearing on behalf of the Plaintiff

GREGORY A. KARLE, Esquire, and GERALD J. VILLELLA, Esquire, appearing on behalf of the Defendants

Sylvia M. Waid, RPR-CM – Official Court Reporter

[p. 2] P-R-O-C-E-E-D-I-N-G-S

(Whereupon, the following discussion occurred in chambers:)

THE COURT: Please place on the record who you are and who you represent, gentlemen.

MR. VILLELLA: Gerald Villella –

MR. KARLE: Greg Karle, K-A-R-L-E. We represent the city and the individually named city councilmen.

THE COURT: And the mayor.

MR. KARLE: And the mayor.

MR. VILLELLA: Gerald Villella for the same defendants.

MR. FRIEDMAN: I'm Philip Friedman. I represent the petitioner.

THE COURT: All right. I believe there's an offer of proof to something you want to offer, Mr. Friedman?

MR. FRIEDMAN: That's correct, Your Honor. This morning we will be playing a tape of a City Council meeting that occurred on September 28, 1994, which is the date on which this ordinance was enacted. Each of the respondent City Councilmen spoke at that time about their reasons for voting in favor of this ordinance. Applying the district court's decision in *Triplett Grille, Inc. versus Akron,* we will present this to show the intent of the legislative branch in adopting this [p. 3] particular ordinance. And you will see after reviewing this tape that their intent was to enact this strictly for morality purposes and for no other purpose, and it mirrors the intent of City Council in the *Triplett* case.

THE COURT: Counsel, will you stipulate that that's what it does?

MR. KARLE: No, Your Honor, we won't stipulate to that.

THE COURT: All right. Well, I'm going to allow it as evidence in the case. It's statements made by City Council members?

MR. FRIEDMAN: Yes.

THE COURT: Not any statements as to what anybody else said?

MR. FRIEDMAN: I won't play anything other than the City Council statements.

THE COURT: Do you have a copy of the transcript?

MR. FRIEDMAN: There is no transcript.

THE COURT: You didn't type it up at all?

MR. FRIEDMAN: No, I just received it yesterday afternoon, Judge.

THE COURT: We're going to allow that into evidence. I'm not saying what the effect will be of the evidence.

[p. 4] MR. VILLELLA: Those are almost never transcribed. They just videotape them and preserve them that way unless there's some need to transcribe it.

THE COURT: The Court will – after hearing the case today, the Court will make an effort to file the opinion today, but it might be almost impossible. We will file it no later than Friday at four p.m. In the meantime, the Court will be ordering the defendants not to enforce the ordinance until such time as the opinion is filed. I will say that on the record. Okay, let's get started.

MR. FRIEDMAN: Your Honor, for the record, do you want to put the findings of fact on at this time?

THE COURT: I'll do it out there.

MR. FRIEDMAN: Okay.

(Whereupon, discussion in chambers concluded at 10:19 a.m. and proceedings continued in open court at 10:25 a.m. as follows:)

THE COURT: For the record, for those in attendance, the Court will endeavor to get this opinion out as quickly as possible, hopefully by today, but I'm going to have to have some latitude on that. It will be no later than Friday. In the meantime I'm going to be ordering the city not to enforce that until sometime Saturday if, in fact, I rule in your favor. [p. 5] I do not want to give a product which is not a valid product. The only way I can do it is give myself some time. We've been working on it the last two days, but obviously we haven't heard the arguments yet, so I don't know where I'm going to rule. The mere fact that I'm ordering the city not to enforce it until Friday say at four p.m. when I get the opinion out in no way should be considered that I'm going to rule in your favor or rule the other way, but it's just something to give me a little leeway time to get the proper product out, work product out.

I have received the findings of fact which I believe counsel have agreed on and will make part of the record, and they are as follows: The petitioner, Pap's A.M., is the owner of a business known as Kandyland, spelled with a

K. The business is located at 1402 State Street in the City of Erie. Is that agreeable, counsel?

MR. KARLE: Yes.

MR. FRIEDMAN: It is, Your Honor.

THE COURT: Okay. As a matter of fact, I'll read them all and go over them. If there's any problems, fine.

Petitioner's business is located in the commercial area of the City of Erie. The petitioner provides entertainment to its customers in the form of nude dancing. The petitioner does not serve alcoholic beverages on its premises, but invites and allows people to bring alcohol to their premises.

On September 28, 1994 the City Council of the City of [p. 6] Erie enacted Ordinance Number 75-1994. The ordinance was signed by Mayor Savocchio on September 30, 1994. It is scheduled to become effective on October 20, 1994. The ordinance is attached as a stipulation. The ordinance, which is attached as a stipulation, is the ordinance which we'll make part of the record.

On October 14, 1994, the petitioner filed a complaint in equity against the above-named defendants. On October 17th the petitioner filed a motion for preliminary and/or special injunction with this Court.

Are there any other facts anybody wishes to make part of the record?

MR. FRIEDMAN: No, Your Honor.

THE COURT: Mr. Villella?

MR. VILLELLA: Not at this point, no.

MR. KARLE: No.

THE COURT: Okay, fine. I guess then do you want to move forward, Mr. Friedman, please?

MR. FRIEDMAN: Very well, Your Honor. Your Honor, at this time we have on the record the basic facts of this case. The basic facts are not that complex. There are a lot of legal determinations which have to be made by the Court, and the Court has the benefit of our briefs to make that determination.

THE COURT: As I said in chambers, and I [p. 7] really mean it, the briefs I received in this in a relatively short time from both sides were two of the best briefs I've had the opportunity to review.

MR. FRIEDMAN: Thank you, Your Honor. Your Honor, under the *Elrod* decision of the United States Supreme Court, when we deal with areas involving expression as protected by the First Amendment, those are – if those rights are infringed upon, that is a per se irreparable harm for which no compensation can be had. Clearly under the law as recognized even by the City of Erie, nude dancing and nudity is – is conduct that is protected by the First Amendment. Even in the *Barnes* decision the majority of the Court said, in fact eight of the nine justices said, that this is entitled to First Amendment protection, although there was disagreement as to how much First Amendment protection.

THE COURT: Well, maybe we can go – take one point at a time. Counsel, will you agree that freedom of the expression of rights is something for which a preliminary injunction can be issued?

MR. KARLE: That's correct. I think that's correct.

THE COURT: So we can cut through that.

MR. FRIEDMAN: Okay.

THE COURT: And I would agree with that concept, too.

[p. 8] MR. FRIEDMAN: Under –

THE COURT: It is not a case where you generally have to meet the other requirements. That doesn't mean you're entitled to preliminary injunction, but as to that requirement, that freedom of expression is involved, and clearly it's involved, no matter how slight it's involved, you are entitled to preliminary relief. Is that a fair statement?

MR. VILLELLA: That's the irreparable harm part of it.

THE COURT: Yes. I'm not saying that that's a final –

MR. VILLELLA: I understand.

THE COURT: I'm not saying that's final, but as to that test. We can save time arguing about that issue.

MR. FRIEDMAN: Under the Supreme Court's decision in *Schad versus Borough of Ephraim*, the burden then shifts to the government to justify its substantial restriction of protected activity. At this point in time then we have satisfied our burden. It is up to the City of Erie to show under the *Schad* decision, under the *O'Malley*

decision they have to now justify their conduct to the Court.

What we intend to present today is a tape of City Council's meeting from September 28, 1994. We're not going to show the entire meeting, but what we want to show is – are the statements made by the various City Council members regarding [p. 9] their rationale for enacting the statute. This is a clear indication of the legislative intent which the Court has to apply in this case.

THE COURT: What will be your offer of proof? Maybe the parties would agree to it. What is your offer of proof as to what they said?

MR. FRIEDMAN: The test going back to the *Barnes* case –

THE COURT: No, I'm asking what is your offer of proof as to the tape.

MR. FRIEDMAN: I just wanted to explain what I was doing.

THE COURT: I'm familiar –

MR. FRIEDMAN: Okay. In terms of my offer of proof, what this tape will show, Your Honor, is that this ordinance was enacted solely for morality purposes as seen by four members of City Council. It will clearly show that these four people reached a moral decision for their own religious purposes, or for whatever other purposes, decided that they themselves did not condone nudity or nude dancing. Based upon that and that alone they enacted this particular piece of legislation. That is what this tape will show.

THE COURT: Do you stipulate to that?

MR. VILLELLA: No.

MR. KARLE: No, Your Honor, we're not going [p. 10] to stipulate to that. I mean, we – we agree that he has a tape, we agree that City Councilmen will talk on the tape, and we agree that they're going to express some opinions.

THE COURT: But you're not going to agree –

MR. KARLE: That it's not controlling. Our position is that the legislative intent is embodied in the ordinance, it's made a preamble of the ordinance, and that is what is controlling and that is what should be examined as far as legislative intent is concerned, Your Honor.

THE COURT: With that in mind, let's move forward and let's watch the tape.

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Are you going to make this an exhibit?

MR. FRIEDMAN: I am, Your Honor.

THE COURT: Plaintiff's Exhibit 1.

MR. FRIEDMAN: Yes. This tape, the tape that I have includes the entire council meeting from that day. I'm only going to be showing the part that's relevant to our determination. I can provide the Court with a copy of just this portion or a copy of the entire council meeting, whichever the Court desires.

THE COURT: I would assume maybe a copy of the – what do you gentlemen want?

MR. FRIEDMAN: The city has it. They're the [p. 11] ones that provided it.

MR. KARLE: Yes, we have it.

THE COURT: You have the tape?

MR. KARLE: Yes.

MR. VILLELLA: That's what we got.

THE COURT: All right. Let's just provide what's relevant, and if there's other portions that are not shown, counsel, then we would ask you to bring it forward.

MR. FRIEDMAN: May I start it, Your Honor?

THE COURT: Yes.

(Whereupon, the videotape was started.)

(Whereupon, this partial transcript is concluded.)

CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct partial transcript of the same.

/s/ Sylvia M. Waid
Sylvia M. Waid, RPR-CM
Official Court Reporter

The foregoing partial record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

/s/ _____
George Levin, Judge

PAP'S A.M. t/d/b/a KANDYLAND	:	IN THE COURT OF COMMON PLEAS
VS	:	OF ERIE COUNTY,
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES THOMPSON, in their official capacities	:	PENNSYLVANIA CIVIL DIVISION NO. 60059-1994

PARTIAL TRANSCRIPT OF INJUNCTION
(Videotape of Council Meeting of 9-28-94)

Proceedings held before the HONORABLE GEORGE LEVIN, in Courtroom B, Erie County Courthouse, Erie, Pennsylvania, on Wednesday, October 19, 1994.

APPEARANCES:

PHILIP B. FRIEDMAN, Esquire, appearing on behalf of the Plaintiff

GREGORY A. KARLE, Esquire, and GERALD J. VILLELLA, Esquire, appearing on behalf of the Defendants

Sylvia M. Waid, RPR-CM – Official Court Reporter

[p. 2] P-R-O-C-E-E-D-I-N-G-S

(The following transcript contains transcription of the videotape of Erie City Council Meeting only.)

THE COURT: If anybody cannot see, they're more than welcome to approach.

(Whereupon, the videotape played as follows:)

VOICE: We have ordinances for final passage. Council File 14,482. An ordinance. Amending Article 7 of

the Codified Ordinances of the City of Erie, General Offenses, by repealing the present Article 711, Indecency and Immorality, and substituting a new Article 711 to be titled Public Indecency, prohibiting certain conduct in public places, providing definitions relating thereto, and providing penalties for the violators thereof, including fines, imprisonment, and declaration of public nuisance, as appropriate. Motioned Mr. Thompson, second by Mr. Brabender. The Council File Ordinance 14,482, now known as Special File Ordinance Number 75-1994, be finally passed by City Council.

MR. MARAS: Mr. Chair – Mr. Chair, yeah. Jim, before we get into – I know you want the floor, Jim and other members. Mrs. Robison has a sickness in the family. Her in-laws are very sick out in California and couldn't be here [p. 3] tonight. I received a memo from Mrs. Robison this evening and request to read this just before the – we address this ordinance. So this is from Mrs. Robison for the public record.

"Robby and I are in California because his mother is seriously ill. I regret my absence from tonight's meeting, but I do want it recorded that I fully support the proposed ban on public indecency. It is not a new law, it is an updated, enhanced version of Article 711 of the Codified Ordinances. The value of this total nudity ban as added publicly reaffirms the commitment of its supporters to be guardians of the community standards of decency and respect long ago established in this family-oriented city. My concern is that it will become just another piece of yellowed paper languishing in an ordinance book like the

article it's replacing. City Council cannot enforce ordinances, but we have an obligation to monitor those who do, and that is a challenging part of tonight's vote."

Mr. Thompson?

MR. THOMPSON: Mr. President, to pick up on that and maybe to clarify some of this, I think it's rather interesting that no one picks up on the fact this ordinance is repealing an existing ordinance that's entitled "Indecency And Immorality," which dates back in the history of this city 128 years. And it's being replaced not with a nudity ordinance, but an ordinance that's being entitled Public Decency – Public Indecency, excuse me.

[p. 4] And exactly what Denise said in her letter, part of the problem is seeing that the ordinance is enforced. If anybody is aware of that, I am. I passed a noise ordinance. No one can ask more times than I have how many times it's been enacted, and it has been, I don't think sufficiently. But then again, when I hear people – Gail, you've said it won't be enforced anyway. I remember you people fighting drastically to have a cat licensing ordinance passed, and I don't hear any of you too concerned of how it's enforced, what's being happened with cat licenses.

But, you know, it was brought up earlier that this isn't a funny matter, and, you know, it isn't a funny matter. It's a very serious matter. This is an ordinance that was sent down by the mayor. It's supported by the Solicitor's Office. It's supported by the District Attorney's Office. And we've had the police chief assure us that it has his support and that he'll see that it's enforced. The

problem here is we are talking about community standards and public decency. We're not talking about nudity. We're not talking about the theater or art, which are all protected forms by the Constitution, by the interpretations of the Supreme Court of this country. We're talking about what is indecent and immoral.

The amazing thing is one of the places in question here was cited by the Pennsylvania Liquor Control Board for having indecent, lewd, and immoral entertainment with contact with the clients. That was by the State of Pennsylvania according to the [p. 5] state laws, which we are simply reaffirming. Somebody earlier said, "We don't have people running around the parks nude" and so forth, and no, we don't; but if we did, we don't have an ordinance that prohibits it, and this ordinance would.

But this ordinance specifically talks about indecent behavior, lewd and immoral. And if you look up lewd in the dictionary, it's lust, vulgar, worthless, obscene. And obscene if you look it up in the dictionary says it's indecent, repulsive, disgusting, and sexually exciting. That's what we're talking about. That's what we're prohibiting. We're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion.

The ordinance says public indecency, and it is very well-defined. Those of you who argue your rights are being taken away from you, there are many people who like to play Barbout, or throw dice, or whatever else. And whether it's behind closed doors, in private, or whatever, we've raided those places, we've arrested those people and sent them to prison, because it is against the law.

There is no right in the Constitution for indecency anywhere you can find it.

And this ordinance is backed up by a 1991 Supreme Court decision, the State of Illinois versus Barnes Theaters, which is very explicit, very upholdable in court.

And we are now talking about public access coming into Erie with television. We are simply affirming the community [p. 6] standards that have been established by our fathers and forefathers long before us that will also enable us to watch what goes on on public access.

It is live pornography. It is not acceptable in this city, has never been, and will never be. It's not a religious issue. It is part of government. It has been upheld by the Supreme Court of the state as well as the United States, and it is part of our job. Check your history and see. It is up to us to establish, reestablish the community standards for this community. That is one of the reasons we were elected, whether you happen to agree with us or not.

I think it's a very important thing that has to be done. You know, in 1977 an ordinance was passed on lewd entertainment in this city. Two members of this council now were on that body when it was passed in 1977. It wasn't considered taking away someone's right, but in their wildest dreams they didn't think that 20 years later we'd be where we're at, and that's why we have to have some redefinement of where we're at. But it isn't something new, it isn't something strange, it's standing up for what has built this community and made us what we are.

I'm very proud to sponsor it, happy to have the administration's support, and I'd ask my council members to vote for it. Thank you.

COUNCIL PRESIDENT: Thank you, Mr. Thompson. Any other member? Mr. Brabender?

[p. 7] MR. BRABENDER: Talk about community standards, I noticed a billboard going down Pittsburgh Avenue that the Church of the Covenant has that talks about community standards and community, family values. They also have run it on television, tremendous thing about family values. That's what we're talking about here is values of the community, what we stand for.

You know, as far as nudity goes, that's – it's in the eyes of the beholder sometime. I taught physical education for 31 years at Strong Vincent High School. I was in charge of all the swimming classes. Kids always swam in the nude until about 20 years later one person demanded to wear the suit, and so from then on everyone had to wear them. But no one ever thought of that as being lewd, indecent, because it wasn't. There's something took place.

The reason they didn't wear the suits, I better explain that, the girls wore suits because they had the dryers and the washing machines there, and after every class the girls would just throw the suit in there and it would be washed, and every time they went to the class they'd have a nice clean suit. The boys didn't have one. And so if they didn't wear – if they wore suits and they put on filthy suits and there was no way of getting it, the string and dirt and filth and everything would go into the

water, and so the Health Board told us we shouldn't do it till this later date.

[p. 8] But what I'm getting at is it wasn't indecent, it wasn't an immoral thing, and yet there was nudity. Oh, but this goes on in the places.

And you know, I think of an 18-year-old young person I have in class, I'd meet them on a Friday afternoon, I taught thousands of them, and then when I think of them going to the place along with 21, 25, 35 year old people who are drinking here, they're not allowed to drink at 18 years of age, but they can frequent some of these clubs along with them. I don't know if that's a real wholesome atmosphere.

I was never pressured by anyone. I happen to be of the Roman Catholic faith, and I don't think Bishop Trautman would know me if he saw me walking down the street. It wouldn't have anything to do with it. Or any of the other two emuses[1] from the Lutheran and Episcopal faith. That has nothing to do with it.

I personally had listened to all the discussion, and I personally feel that I – I represent support the ordinance, and that's why I'll vote in that manner.

MR. BAGNONI: Mr. President?

COUNCIL PRESIDENT: Mr. Bagnoni?

MR. BAGNONI: Back in 1977 we introduced an ordinance, and then again we come back in 1985 with an ordinance. If that ordinance would have been supported

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[1] [Probably "eminences"]

and enforced, two places wouldn't be in business today; that would be Mr. Carr's place and Jiggles place, because they're near a [p. 9] residential – where one of the residential homes are or a church. You are in violation.

Now, what bothers me, Rita, is it was in the paper quoted where one of your offices upstairs in Zoning made the remark that somebody higher up ordered him to pull his horns in. I want to know who that was. That I want to know.

VOICE: Yes, we do. I agree a hundred percent.

MR. BAGNONI: I think there's one of the problems. The ordinances are on the books and not enforced. Now this takes place. You really didn't need any other ordinances.

Now, what this ordinance is, and it'll pass, I'll tell you right now, the girls can wear thongs or a G-string and little pasties that are smaller than a diamond. That's as close to being nude as you want to be.

Now, let me tell you, you know, the last place that I knocked off was a bottle club. In my time they were illegal. All right? I don't know if any – any other place has ever been touched since. I doubt it. But houses of ill repute, they didn't cause any problems. They're quiet places. People would go in and they'd come out, you know. But it's a violation of the law, and our job was to enforce the law. And if you have the ordinances and don't enforce the laws, then we have a problem.

[p. 10] Now, they say, "Well, you know, I don't go to those places, I don't have a need to go to those places, and if people want to go to those places, that's their

problem." What has taken place in this country is really something, and it's a real problem. We have pre-teenage pregnancies, we have free condoms in schools, drive-by shootings, abortions, suicide machines, kiddie porno, child abuse. Since 1990 we've had a 560 percent increase in violent crimes, and in the last 30 years illegitimate births have increased 419 percent; teenage suicide rate has increased 200 percent; student achievement test scores have dropped 80 points.

You know, it's unbelievable. Where would you ever think in my time that a 10-year-old or 11-year-old boy would commit murder? Where the hell have our morals gone to?

I think that the parents have a responsibility that they don't realize that they have. If they had grown under the roof of my mother and father they'd have been taught a few things. I don't think that parents are doing the job they're supposed to be doing, and anything that happens in the community has an effect on the total community.

Now, you wonder why there's an increase in – in rape, incest, sodomy. Boy, they do everything today, something I didn't even know at the age of 18. But something has to take place, and at this point we've come to this, and we have no alternative but to pass this at this point.

[p. 11] Gentlemen, that's all I have to say.

COUNCIL PRESIDENT: Thank you.

MR. BRZEZINSKI: I missed the vote on the first reading last week. I wasn't here. Prior to that I made a

statement saying that I would vote to make this an ordinance for one reason and one reason only, and that was to call public attention to the fact that I felt very, very strongly, and I feel just as strongly right now, that this is a zoning matter.

I thought long and hard, and I rethought. People who know me know that I'm pretty active in my Roman Catholic religion and my church, and I don't advocate the things that we're talking about here. But we're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which – or three, all three, will be shut down in one form or another until they figure out another way to get around it and do it again. That's not good enough for me.

And I won't be a populist, I won't be popular with everybody. Mr. McKinney, please get it right this time, because you missed it the last time I talked. I'm totally serious. Don't get me wrong, folks, I am for decency, I am not a nudist or anything crazy like that, but I do have a problem sitting up here in City Council and trying to play God with the rest of the world. That's not my job. I think we'd better start doing our job in that damn zoning department upstairs so things like this aren't tossed at our necks, because it's not right.

[p. 12] And that's all I have to say.

COUNCIL PRESIDENT: Thank you, Mr. Brzezinski. Mrs. Wright?

MRS. WRIGHT: I'm the one that voted against the ordinance. I will vote against the ordinance again tonight. I still feel that this is a question concerning your

Constitutional rights to do whatever – not whatever you want to do, but behind closed doors, in the privacy of your homes, your clubs, I just – I don't think I should sit here and judge you.

I'm not for nudity. I'm against violent pornography. I only had one woman, one person call. It was a woman, and it was tonight, and she said, "Why are you for the nudity ordinance?" She said, "I can't understand that." And she said, "I know – I heard you go to church" – and thank you, Mr. Brabender, for the promotion for my church.

MR. BRABENDER: I didn't know where you go to church.

MRS. WRIGHT: Oh. Thank you anyways. But I'm still going to vote no. I just – I don't know. I see things in here, even though many people, many good people spend a long hard time trying to get something that was enforceable, something that in their mind was realistic, that was good for the community, and I appreciate their efforts, but I still believe that I'm – that – and you don't have to – if I run again you don't have to vote for me, and I understand that, but [p. 13] I think I should say no to this ordinance at this time. Maybe in the future there would be something more acceptable, but at this time no. We have Constitutional rights and, you know, if you want to go to these bars, bottle clubs, I still think that you have a right. Thank you.

MR. MARAS: I'm just going to touch briefly on one aspect that was brought up. I received a letter the other day, and I think a gentleman alluded to it tonight, about the financial aspect of if this ordinance passes that

there'll be people losing their jobs and going out of business and things. Well, if you take a look at history, and this total nudity subject came up recently, in the last months, not years, months, take a look at Partners Tavern out in Harborcreek and Hanky Panky's is two examples of businesses that have kept open for many, many years. They've been there I don't know how long, but you have to do a little research, many, many years and been successful. They've made a lot of money.

As a matter of fact, Partners Tavern burned down, I believe, and the Harborcreek supervisors, elected officials, responsible people, gave them a variance I believe they needed to reopen and rebuild that – that establishment. That's exotic dancing, adult entertainment, and it will continue to be there after tonight; total nudity won't, but it hasn't been really their mainstay in the past anyway.

So those people who cry that a great financial burden [p. 14] will be placed on them and they'll lose their jobs, that's just not true. There still will be adult entertainment in this town, only it will be in a little different form. And again point to those two examples as financial successes. So for those people who think this ordinance is going to close those places down, that's just not true. And of course Partners is in Harborcreek, we understand, but Hanky Panky's is in the city limits.

Also one point, you know, one – one person called me and asked me, they knew where I voted for the ordinance last time, and it was a woman, a woman I'd say sounded like in her mid-50s, maybe 60s, says, you know, "If I – these people that are for this total nudity, wonder if

they had a daughter 18 years old or older, these people that are all for this, and they're certainly entitled to speak up on it, would they allow their daughter to dance totally nude in an establishment in the Erie area?" I doubt if many would stand up and come before us tonight and say they would. I doubt it very much. Mr. Klemm?

VOICE: Call for a tote.

(Whereupon, the videotape was completed.)

THE COURT: Is that it?

MR. FRIEDMAN: Yes, Your Honor.

(Whereupon, this partial transcript is concluded.)

[p. 15] C E R T I F I C A T I O N

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct partial transcript of the same.

/s/ Sylvia M. Waid
Sylvia M. Waid, RPR-CM
Official Court Reporter

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

/s/ _____
George Levin, Judge

PAP'S A.M. t/d/b/a KANDYLAND	:	IN THE COURT OF
	:	COMMON PLEAS OF
VS	:	ERIE COUNTY,
	:	PENNSYLVANIA
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES THOMPSON, in their official capacities	:	CIVIL DIVISION
	:	NO. 60059-1994

PARTIAL TRANSCRIPT OF INJUNCTION
(End of videotape to end of hearing)

Proceedings held before the HONORABLE GEORGE LEVIN, in Courtroom C, Erie County Courthouse, Erie, Pennsylvania, on Wednesday, October 19, 1994, commencing at 10:15 a.m.

APPEARANCES:

PHILIP B. FRIEDMAN, Esquire, appearing on behalf of the Plaintiff

GREGORY A. KARLE, Esquire, and GERALD J. VILLELLA, Esquire, appearing on behalf of the Defendants

Sylvia M. Waid, RMR – Official Court Reporter

[p. 2] P-R-O-C-E-E-D-I-N-G-S

(Whereupon, the following contains the portion of the hearing from the conclusion of the videotape showing to the conclusion of the hearing.)

THE COURT: Thank you. Could you give us a copy of that? We'll call it Court Exhibit 1.

MR. FRIEDMAN: I will, Your Honor.

THE COURT: Any additional testimony?

MR. FRIEDMAN: No additional testimony, Your Honor.

THE COURT: I only want one of you to speak. I don't care which one does.

MR. KARLE: Are they resting, Judge?

THE COURT: Do you want to offer any testimony at this stage?

MR. KARLE: No, Judge. All we would offer into evidence is a copy of the ordinance, Your Honor.

THE COURT: All right. That's already been offered.

MR. KARLE: All right. If the Court could take notice of the ordinance?

MR. VILLELLA: Are you accepting the argument that we have any burden of proof to go forward with anything?

[p. 3] THE COURT: Well, I think it's a preliminary injunction. If you feel – you might want to move forward on the burden of proof. I'm not trying to tell you how to try your case.

MR. VILLELLA: In our case we don't.

MR. KARLE: We have nothing else to offer, Judge.

THE COURT: Well, I guess in that case we'll proceed to argument. I think all parties should know that this is not a situation where the Court places a stamp of approval or disagrees with the type of dancing that is being done there. My personal opinion is really not relevant to the issue. I think those of you who know me know what my personal opinion is, but it's completely irrelevant to this. What we're trying to determine is whether or not there is a Constitutional right for which there be an injunction granted. I think there are certain issues, and I think you might agree with me that they're really not relevant or the Court need not discuss it.

I think the only issue before the Court, correct me if I'm in error, is the issue of whether or not a preliminary injunction should be issued. You have raised other issues in your brief and in your motion, including declaratory judgment. You've also raised the issue of pre-emption. But the only issue that I really see as ripe for my determination at this time is the preliminary injunction request. Would you agree with that, [p. 4] Mr. Friedman?

MR. FRIEDMAN: I would agree with that, Your Honor.

MR. KARLE: That's correct, Your Honor, that is our understanding.

THE COURT: Okay.

MR. FRIEDMAN: Your Honor, just to make clear, we have to show a reasonable iikelihood of success on the underlying issues in the case, and that's why the Court also has to look at the pre-emption question, the overbreadth question, the First Amendment question, the

Article 1 Section 7 question, because those are the actual underlying issues. In order to get a preliminary injunction, we have to show that we have a reasonable likelihood of success.

THE COURT: In other words, you would feel that the pre-emption issue has to also be discussed in the opinion the Court renders –

MR. FRIEDMAN: All the Court has to do is say there's a reasonable likelihood of success on one issue, not all of them. I'm saying there's substantial issues involved, including pre-emption.

THE COURT: But at this stage I definitely don't have enough information or testimony or anything else to determine pre-emption. I don't even have the – I may well want to look at the state statute to see what the intent was in [p. 5] passing the state statute. My own thought is it would be very improper for me to do it, but if you want me to consider it, I would think that if that's what you want me to consider, I certainly cannot decide that by Friday. We would have to have a lot more testimony as to what the state's intention was when they enacted it.

MR. FRIEDMAN: It's totally up to the Court what to consider. What I'm suggesting to the Court is that a preliminary injunction be granted to maintain the status quo so that the Court can have opportunity to review all of these arguments, so that we have an opportunity to present whatever evidence is appropriate.

But they are all important issues, I suggest. Applying the standard, all the Court has to do is take one issue and

say that is an issue where you have a reasonable likelihood of success. If the Court finds that on the First Amendment issue, which I would suggest the Court should, then the Court need not look at the other issues.

THE COURT: Well, on the other hand, I just – I'm not in a position at all to take pre-emption. I certainly have to address whether there's a reasonable likelihood of success on the basis of the Constitutional guarantee. We'll address that.

What I would like to do is just ask a few questions then and let you argue it. As I said, the briefs were [p. 6] excellent. What disturbs the Court from one standpoint, I would like your expression, as I said in chambers, what about the – what effect would this ordinance have on theater – theater productions such as Equus, Hair, O Calcutta? Under your ordinance would these things be prevented, Mr. Karle?

MR. KARLE: No, they wouldn't, Your Honor.

THE COURT: Why not?

MR. KARLE: To the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression, they would not be.

THE COURT: Where does that say that in the ordinance, sir?

MR. KARLE: Paragraph 6 in the construction and severability clauses. And I might also point out, Your Honor –

THE COURT: Where does it say it?

MR. KARLE: Paragraph 6.

THE COURT: Paragraph 6 of the –

MR. KARLE: The ordinance, Judge.

THE COURT: I'm not sure what you're saying, sir. Six is construction and severability. Is that what you're talking about?

MR. KARLE: Yes. And also in the preamble, the recital "Whereas council is fully aware and wholly respects the fundamental Constitutional guarantees of free speech and [p. 7] free expression." That would guarantee protection for other productions which are claiming a higher protected expression than the plaintiff here.

THE COURT: But that's the preamble. It is not in the legislation itself.

MR. KARLE: It does become a part of the ordinance, Judge.

THE COURT: The preamble is important sometimes when there is confusion as to an ordinance. Many times we do go into that to determine legislative intent. But if the ordinance says it in black and white, we would certainly look to the ordinance as opposed to the preamble.

MR. KARLE: And also, Judge, as a state court you are empowered to construe an ordinance. So if, in fact, it is your concern that another would be harmed by this, you're simply free to construe this ordinance to protect those rights, if it's the Court's concern.

THE COURT: I saw that in your brief. I'm not sure I adopt that. I am concerned about the federal expression. Anything else on that issue?

MR. KARLE: No, Judge.

THE COURT: How do you feel about that, Mr. Friedman?

MR. FRIEDMAN: Your Honor, look at the ordinance. The ordinance prohibits state of nudity in a public [p. 8] place. A public place is defined as every possible place other than your home. This ordinance prohibits Equus, it prohibits Hair, it prohibits O Calcutta. It prohibits me to go down to Gannon University in the locker room and undress at lunchtime to play sports, because it's prohibited in here.

Now, when they enact this ordinance they're telling you well, look at the preamble. Look at the Constitution. It says Constitutional rights. Who's going to decide that? Is Mr. Karle? Is Mr. Villella? Is City Council? Is the Court going to have to hear every instance?

Let me give you an example. Let's say that a Broadway production of Hair wants to come to the City of Erie. They take a look at this ordinance and say no nudity. Now they have a couple options open to them. They can say, "Well, we think we have an inherent First Amendment right, we're going to go in and spend $10,000 on lawyers and litigate this question because we don't want to get arrested, we don't want the police to come in and raid us." That's why we have an overbreadth doctrine. The Court is exactly correct. It prohibits that. It even prohibits a mother from nursing a child who is over two

years of age in public. It prohibits a child over ten from taking her shirt off in public. It's ridiculous. This ordinance is patently absurd and –

THE COURT: Well –

MR. FRIEDMAN: I'm sorry, Your Honor.

[p. 9] THE COURT: No, I really want to hear your argument. I'm not trying to cut anybody short, because I obviously don't know where we're going to go in this.

MR. FRIEDMAN: I agree with the Court, and I think it's a real problem, and that's why we have –

THE COURT: But is it possible – let's assume for purposes of argument that the ordinance was amended to say that theater productions such as Equus and Hair and O Calcutta would be permissible. Could they do that and not allow this?

MR. FRIEDMAN: No, they can't list productions.

THE COURT: Well, I mean theater productions to be presented by a normal –

MR. FRIEDMAN: In this Commonwealth – in this Commonwealth we have a state obscenity statute, Section 5903 of the Crimes Code, which covers obscenity. It applies the Supreme Court's guidelines in *Miller*, which the Court is probably very familiar with. That's all you need to prohibit obscenity. This does not prohibit obscenity. This doesn't deal with obscenity at all. This deals with nudity. If a person is nude, they're guilty, period, in a public place. Simple as that.

THE COURT: Does anybody have a copy of the state statute handy?

[p. 10] MR. FRIEDMAN: I do, Your Honor.

(Document handed to Court.)

MR. VILLELLA: I believe you'll find that nudity – you cannot have minors under the age of 18 exposed to nudity in that statute, and that we are exercising the local option that is granted to us expressly to make nudity in public places not accessible to people over 18, full nudity as circumscribed by the court decision.

MR. FRIEDMAN: That's just slightly incorrect. There is nowhere in the statute that gives the City permission to outlaw nudity.

THE COURT: Well, if I – let me ask you this: If I apply the state statute, could I make a determination what's going on there is obscene?

MR. FRIEDMAN: I would suggest not. In fact, I have a copy of a memorandum written by the city solicitor saying that they would find it extremely difficult to call this obscene.

THE COURT: I'm not bound by any finding that they have.

MR. FRIEDMAN: I understand, but that's their position as well.

THE COURT: Would you agree with that?

MR. VILLELLA: I – I said – there are certain types of nude dancing that might be obscene, but what

[p. 11] we're hearing and what we're aware of we don't know that we could prove that. There would have to be some sort of activity that is touching patrons or some sort of other lewd activity that is beyond what we're hearing.

THE COURT: In other words, dancing itself would not be obscene?

MR. VILLELLA: It's possible to have nude obscene dancing, but we don't know where that line is. We're not entirely sure of that.

MR. FRIEDMAN: If that's the case, Your Honor, if the City believes that, let them enforce the state statute against my clients if they think this is obscene conduct. They know as well as I do that there's no way that it's obscene. But the important point is the Supreme Court has applied and adopted standards to make that determination, and that's what would have to be proven.

THE COURT: Let me ask this question. And again, I – I should have read this before, and I apologize for not reading it. Doesn't the statute basically talk about minors only?

MR. FRIEDMAN: No, no. Take a look at Subsection (a)(5).

THE COURT: (a)(5)?

MR. FRIEDMAN: Yes.

THE COURT: You're talking about this here? [p. 12] This section here? Why don't you come forward?

MR. FRIEDMAN: Judge, I don't have another copy.

THE COURT: Why don't you underline what you say applies to everybody, please?

MR. FRIEDMAN: Subsection (a), Your Honor does not just apply to minors. In fact, none of it does.

THE COURT: Let me take a look at it, please.

MR. FRIEDMAN: But Subsection (a)(5) makes it an offense to produce, present, or to direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity.

THE COURT: That is listed –

MR. FRIEDMAN: That's the pre-emption argument, Your Honor.

THE COURT: All right. What else do you have to say, gentlemen? Any other arguments? Let me ask you this question: You know, we all agree that in order to get a preliminary injunction your right must be clear with the likelihood of success. How can this Court, when there's these various opinions by the United States Supreme Court which you disagree with, and I think there's five or six opinions in the one case of the Supreme Court where there's an opinion from the district court which goes contrary, how can this Court determine that this is a clear right?

[p. 13] MR. FRIEDMAN: The Court –

THE COURT: Not a clear right. That your chances of success are clear and that you're going to win? I'm faced with these brilliant people who have written otherwise. And I realize the one decision which you say is wrong is *Barnes*, because there were various opinions

raised, but certainly the Court has to take knowledge that there is that opinion out there. We have to take knowledge of the district court case, and I have to take knowledge that the appeal has been allowed in that district court case. How can I be sure that the right is clear?

MR. FRIEDMAN: It talks about a reasonable likelihood of success, Your Honor. And Your Honor is talking only about one issue, and that's the freedom of expression issue. I would suggest to the Court, and we've argued this rather extensively in our briefs, that the Court ought to apply the *Triplett* decision, which is post-*Barnes*. The Court is going to have to review *Barnes* in detail. The Court is going to have to review the other decisions.

If you go back before *Barnes*, you will see that there are a number of cases which are quite clear and which *Barnes* does not c[illegible]ule and which support our position. *Doran* is an excel[illegible] example. If you look at the district court's decision in *Doran*, they granted a preliminary injunction for an ordinance which is substantially similar to this ordinance. That [p. 14] preliminary injunction was affirmed by the Second Circuit. It was affirmed by the United States Supreme Court in a decision written by Justice Rehnquist. The Court does not at this point in time have to decide for certain that we are right. The Court has to decide if there's a reasonable likelihood of success on that issue.

The second issue is even clearer, Your Honor, and that's –

THE COURT: I think I can take the – taking your interpretation there is a likelihood, but whether it's reasonable I don't know. There's a very good possibility it

will be upheld, but with all those conflicting opinions, I have problems with that, I will be honest with you.

MR. FRIEDMAN: Sure, and I can appreciate that the Court is going to have to study these and make its opinion. But if you look at Pennsylvania case law on injunctions, the important point of a preliminary injunction is to maintain the status quo. This club has been in existence for two years in this city.

THE COURT: I am very much aware, Mr. Friedman. You gentlemen did not cite that. That's one you did not cite. This is what's called a prohibitory injunction as opposed to mandatory. In prohibitory the requirements are not as stringent as they are in a mandatory injunction, but they still are there.

[p. 15] MR. FRIEDMAN: Absolutely. And what we're asking the Court to do is just prevent criminal prosecutions based upon freedom of expression until such time as the Court has an adequate opportunity to review this in detail.

Judge, even if you put aside the First Amendment question, which is complex, look at the overbreadth issue which has been affirmed by every court, to my knowledge. This – it wasn't dealt with in *Barnes*. They did not discuss the overbreadth issue. The overbreadth issue has been dealt with extensively, and I've cited the cases in my brief. The Court has recognized and questioned them about the overbreadth issue. There is no doubt whatsoever that this statute is overbroad. It applies to Equus, it applies to –

THE COURT: But the moment they try to make it more specific you'll be in court saying that they're classifying and they're –

MR. FRIEDMAN: And I may.

THE COURT: And you would do it very capably. I know your abilities, sir.

MR. FRIEDMAN: And I may very well do that, Your Honor, but that's not the issue today. The issue the Court has to decide is the case in controversy before it: Is this case overbroad or isn't it? And it is. There's a substantial likelihood of success on that issue. I don't see how the Court could rule any other way, frankly, Your Honor.

[p. 16] And the Court can say Well, they can go back and change the ordinance. Well, let them. Let them go back and try to change the ordinance. This ordinance is directed at two bottle clubs, and my clients got caught up in it. If the Court wants to know the history of it, as one of the council members said, "The zoning office screwed up. That's why we have to go and make this ordinance up." If they honestly are concerned about secondary effects, they can deal with this in a Zoning Ordinance without any question. They have the right to zone, to prohibit certain conducts in certain areas of the city, but they turned it into a morality issue. And I think it's clear from what they've done here today, I think it's clear that it's overbroad.

Does the Court have to decide if we have a substantial likelihood of success? Sure the Court has to decide that. But all we're doing is asking the Court to maintain

the status quo until such time as the Court has an adequate opportunity to review the entire record. I don't think that we can step in and say Well, we're going to infringe on everybody's First Amendment rights in this community. And Gayle Wright, she took a courageous stand on this thing. I told her was it was a profile in courage.

THE COURT: Because she agreed with you?

MR. FRIEDMAN: No, no, because she agreed – she agreed to take what she perceived to be an unpopular stand in favor of the First Amendment to the Constitution as against [p. 17] the letters that they received from the various church leaders around the community. She stepped forward and said, "I'm going to stand behind people's Constitutional rights. I'm a mother. I may not agree, I may not want to view nudity myself, but I certainly recognize in this country that we have freedom of expression." And that's all she said.

Mr. Brzezinski said the same thing. You have four members of City Council who took a morality view on this, I think it's clear from that, and said, "We don't think this is moral." I mean, I wrote down some of the comments. The SAT scores are going down, there's condoms, there's abortions going on.

Now, they have a right to their opinion, and I may agree with a lot of what they said, but that doesn't give them the right to take away the Constitutional rights of other people, whether it be the majority or minority, and that's exactly what this ordinance does. It takes nudity and makes it unlawful. Period. And I think if the Court looks at the various arguments we've made under the

U.S. and Pennsylvania Constitution, under the pre-emption doctrine, overbreadth, the Court should conclude that there is a strong likelihood of success on these issues.

THE COURT: Mr. Karle, do you want to respond?

MR. KARLE: Judge, just concerning the [p. 18] statements of the City Councilmen. I don't think because they've made some expressions of opinion as to morality that that would vitiate the ordinance. I, too, wrote some things down, especially of Mr. Bagnoni's comments, which if I can paraphrase says everything that goes on in the community has an effect on all other parts, and he cited incidents of rape and violent crime. Now, if that isn't touching on concerns for secondary effects of nudity, I don't know what else does. But my point is, Judge, that isn't controlling. It's been incorporated into – into the ordinance, and that's the concerns that are set forth there.

But I would like to just talk about the – the preliminary injunction, Your Honor. I don't see where Mr. Friedman's demonstrated any irreparable harm at this point in the proceeding.

THE COURT: But I thought we discussed that. If, in fact – let's assume that a Constitutional right is being taken away, which he says it is.

MR. KARLE: Well, he's alleged that he's made –

THE COURT: Let's assume further I feel that there is a reasonable likelihood of success in enforcing the Constitutional right. Then he has – then he is in equity, is he not?

MR. KARLE: Well, he is, but I think, Judge, [p. 19] he has at least the threshold burden of coming forth and showing how he's harmed. He's made an allegation in a complaint and in the petition that there's a First Amendment issue at stake here, but I haven't seen one scrap of evidence as to what particular harm has occurred here. I've seen a tape today, Judge.

THE COURT: Well, let's assume that he said that they were restricted from nude dancing, which we're talking about here. Let's assume further I feel – and I'm not saying I feel that way, but that I feel that his right to have nude dancing is clear. Does he not have enough to get an injunction at this stage?

MR. KARLE: Well, if you take that opinion, yes, Judge.

THE COURT: I mean, I'm assuming it is clear. So if I make the determination that his right is clear, then he has enough without any further evidence; am I correct?

MR. KARLE: I would think he would have to have a demonstration as to the expression that's at issue in the case, Judge. I mean, he doesn't have an absolute right to – there is no Constitutional case that I'm aware of that says you can be nude in public. I think we would agree on that. It's the expression that is maybe derivative of that that's at issue. I haven't seen that.

THE COURT: I really hesitate to say this, because I do not want to make a farce of this, I really don't. [p. 20] I do not look forward to it, but are you

saying we would have to view the dance to make a determination?

MR. KARLE: I would think we would have to hear at least from the plaintiff here to see how his rights have been infringed on, Judge. That's all we're saying. We've seen a tape. That's all that has been offered into evidence as to how this ordinance came about.

THE COURT: But we've seen the statute that has passed. We've – and if I – I guess I am reaching, and I apologize. It seems to me I've asked you if I were to determine that – I'm not saying I would, but if I were to determine that it's a very clear right that he has, first of all I think we agree that the right to dance is a Constitutional right. And let's assume I determine that as a matter of fact that he has a good likelihood of success in having his – being able to dance in the nude or what have you, that he will prevail in this case. Do I not have enough to go into equity and give an injunction?

MR. KARLE: Yes, Judge, but I think we still have a fundamental difference.

THE COURT: I'm not saying that I'm going to rule that way, just if, in fact, I were to find it.

MR. KARLE: You can find that one has a Constitutional right to dance, but there is no case that I'm aware of that says you have a right to be nude in public. I mean, that's the fundamental difference that I see, Judge.

[p. 21] THE COURT: We're going to have to look at those cases. Do you happen to have the *Schad* case?

MR. FRIEDMAN: I do, Your Honor.

THE COURT: Do we have a copy of that, Chris?

THE LAW CLERK: No, sir.

THE COURT: May I see that?

MR. FRIEDMAN: Sure.

MR. VILLELLA: You will find *Schad* in Supreme Court was bound by a very broad interpretation of the State Supreme Court.

THE COURT: Is this an extra copy we can keep?

MR. FRIEDMAN: Yes, you can keep that.

MR. VILLELLA: The State Supreme Court said that that ordinance banned all live entertainment in the Borough of Mount Ephraim. Of course that's overbroad. They can't further construe the state statute or local ordinance.

MR. FRIEDMAN: Judge, I would suggest you take a look at *Doran* again, too. Chris, if you haven't got it –

THE COURT: We have *Doran*.

MR. FRIEDMAN: The district court decision. Judge, we're not asking you – we're not coming in here saying that – I mean, this deals with nude dancing as far as my client is concerned. But the Court in construing overbreadth, Mr. [p. 22] Karle is right, it does make it illegal to be nude in any public place. I mean, that's what it says.

MR. VILLELLA: Judge, given what we've said about how the ordinance will be interpreted and

enforced, what is going to happen to Kandyland if this ordinance goes into effect? What is going to happen to them? What does he think is going to happen?

MR. FRIEDMAN: It doesn't matter.

MR. VILLELLA: It does matter.

THE COURT: If this ordinance is passed, could people be arrested at Kandyland?

MR. KARLE: The dancers, conceivably, if they're nude, Judge.

THE COURT: But could not the owners be arrested for conspiracy?

MR. KARLE: No, Judge, the dancers would be cited in the first instance. There's a provision that they could be closed down later on as a public nuisance, but not in the first instance. And they wouldn't be closed down if this ordinance was enacted tomorrow if you did an order.

MR. FRIEDMAN: Judge, I suggest maybe the city solicitor ought to read what he wrote, because in Number 7, the penalty, makes it a crime to promote or maintain or it says as a property owner, proprietor, manager of a business shall be guilty of a summary offense.

[p. 23] THE COURT: I would think under the laws he could be guilty of that, certainly promoting it.

MR. FRIEDMAN: It's right in the ordinance.

THE COURT: I agree with you. I don't often agree with Mr. Friedman, but I do here. I think he certainly could be guilty of something.

MR. VILLELLA: I'm talking about how would their operation change as opposed to what they're doing now if they wear a small amount of clothing.

THE COURT: I'm not judging that issue.

MR. VILLELLA: Fine.

THE COURT: Anything else anybody wishes to say?

MR. FRIEDMAN: Nothing else, Your Honor.

THE COURT: I don't mean to cut you short. If you want to give me a five minute summation?

MR. KARLE: We have nothing, Judge.

MR. FRIEDMAN: That's what I just gave. I think I covered everything that I wanted to cover.

THE COURT: All right. Is there anything else over there?

MR. KARLE: No, Your Honor.

MR. VILLELLA: No.

THE COURT: All right. We'll take it under advisement and try to get it out as quickly as we can. Court [p. 24] stands adjourned.

MR. FRIEDMAN: Thank you, Your Honor.

MR. KARLE: Thank you.

(Whereupon, the proceedings were concluded at 11:20 a.m.)

[p. 25] CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct partial transcript of the same.

/s/ Sylvia M. Waid
Sylvia M. Waid, RMR
Official Court Reporter

The foregoing partial record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

George Levin, Judge

PAP'S A.M. t/d/b/a KANDYLAND	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
vs	:	
THE CITY OF ERIE, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, in their official capacities	:	CIVIL DIVISION
	:	No. 60059 of 1994

ARGUMENT

Proceedings held before the Honorable George Levin, in Courtroom A, Erie County Courthouse, Erie, Pennsylvania, on Wednesday, December 21, 1994, commencing at 2:40 p.m.

APPEARANCES:

Phillip B. Friedman, Esquire, appearing on behalf of the Plaintiff.

Gregory A. Karle, Esquire, appearing on behalf of the City of Erie.

Gerald J. Villella, Esquire, appearing on behalf of the City of Erie.

James M. Muscarella – Official Court Reporter

[p. 2] P R O C E E D I N G S

THE COURT: Good afternoon.

MR. FRIEDMAN: Afternoon, Your Honor.

THE COURT: Let's just do some housekeeping matters, if we may. It's my understanding that respective

counsel have entered into a stipulation which we can make part of the record, is that correct?

MR. FRIEDMAN: That's correct, Your Honor.

THE COURT: I have it in front of me, but do you want to read it, Mr. Friedman, and make sure everybody agrees with that?

MR. FRIEDMAN: Certainly. Your Honor, we have entered into the same stipulation that was entered into at time of the hearing regarding the preliminary injunction. The stipulation reads as follows: "The Plaintiff, Pap's A.M., is the owner of a business known as Kandyland. The business is located at 1402 State Street, Erie, Pennsylvania.

Two, the Plaintiff's business is located in a commercial area of the City of Erie.

Three, the Plaintiff provides entertainment to its customers in the form of nude dancing.

Four, the Plaintiff does not serve alcoholic beverages on its premises but invites and allows people [p. 3] to bring alcohol to the premises.

Five, on September 28, 1994 the City Council of the City of Erie enacted Ordinance Number 75-1994 which is attached hereto and incorporated. The ordinance was signed by Mayor Savocchio on September 30th, 1994. The ordinance became effective on October 21, 1994."

That's the extent of the stipulation, Your Honor. In addition, we will be providing the Court with the testimony that was presented at time of the preliminary injunction hearing, which was basically the statements of

City Council members made at the time the ordinance was adopted. So we will introduce Plaintiff's Exhibit 1, which is a tape.

THE COURT: First let me – do we agree on the first stipulation, Mr. Karle, those five matters.

MR. KARLE: Yes, Your Honor.

THE COURT: You can make that a matter of record?

MR. KARLE: Yes, we can make that a matter of record.

THE COURT: Okay, fine. What about – now, you want to offer into the record the transcript?

MR. FRIEDMAN: The transcript and the tape of the City Council meeting which I have marked as Plaintiff's Exhibit 1.

THE COURT: Any objections to that?

[p. 4] MR. KARLE: No objections, Judge.

THE COURT: Admitted and made part of the record.

(Whereupon, Plaintiff's Exhibit 1 was produced and received into evidence.)

THE COURT: Is there any additional testimony that you wish to offer?

MR. FRIEDMAN: There is not, Your Honor.

THE COURT: Is there any additional testimony that the City wishes to offer?

MR. KARLE: No, Your Honor.

THE COURT: Now, based on a conversation in chambers, we have nothing in writing, the Court did discuss with counsel whether or not it would want a nisi order, which is generally what we would issue in a case like this in a possible way to avoid – to maybe get a quicker result, that you would waive that and the Court would be authorized to enter a final order one way or the other, is that correct, Mr. Friedman?

MR. FRIEDMAN: That's correct, Your Honor.

THE COURT: Is that correct, Mr. Karle?

MR. KARLE: That's correct, Your Honor.

THE COURT: I think – I'm sure, maybe I asked you, you have no testimony you wish to offer either, [p. 5] Mr. Karle, is that correct?

MR. KARLE: Pardon me?

THE COURT: You have no additional testimony you wish to offer?

MR. KARLE: No, Judge, we have nothing.

THE COURT: In each of your briefs that have been filed with the Court, have you prepared any proposed findings of fact?

MR. FRIEDMAN: Your Honor, I think the proposed findings of fact are merely the stipulations.

THE COURT: That would be your position, is that correct?

MR. FRIEDMAN: Yes.

MR. KARLE: We have our own findings of fact and conclusions of law, Judge.

THE COURT: May I see them, please, for a moment.

MR. KARLE: Sure.

THE COURT: You probably gave them to me. Do you have them in front of you, Mr. Friedman?

MR. FRIEDMAN: No, I don't, Your Honor. Oh, they're attached to the brief.

THE COURT: I can't take these unless we have some testimony. Some of these I guess I can take. You want to review those, Mr. Friedman?

MR. FRIEDMAN: Yes. Your Honor, we would not be [p. 6] agreeable to these. There is no evidence on the record to support at least Number 3.

THE COURT: Maybe we will have to have testimony on it then. What about Number 4?

MR. FRIEDMAN: That's a conclusion of law.

THE COURT: That's a fact I thought.

MR. KARLE: Yeah.

THE COURT: It became effective –

MR. KARLE: Requiring – it's not controverted.

THE COURT: Dancers were required to wear –

MR. FRIEDMAN: That's a conclusion of law. They're saying that's what the ordinance says they have to.

MR. VILLELLA: Saying they were –

THE COURT: Well, that's what you are – I'm not trying to be facetious.

MR. FRIEDMAN: Okay.

THE COURT: You are actually fighting that this Court – you are saying that's what they're requiring you to do and you're objecting to it.

MR. FRIEDMAN: That's true. That's what the ordinance says they have to do, absolutely.

THE COURT: That's all it says. What about if it said the "dancers were required by the ordinance," can we have that? Would that be satisfactory to you?

[p. 7] MR. FRIEDMAN: Sure, that's fine. I don't have any problem with that.

THE COURT: Let's make that one modification. I'm not trying to throw something down your throat, but I think that's –

MR. FRIEDMAN: Okay.

THE COURT: Said, "such dancers were required by the ordinance." We will read this afterwards. We want to make sure. What about Number 5?

MR. FRIEDMAN: First part is true, we have entered into a stipulation. That's th[illegible]full extent of the evidence. We are challenging –

THE COURT: I don't think that's really a finding of fact.

MR. FRIEDMAN: Yes.

THE COURT: I'm not – I wouldn't call that a finding of fact.

MR. FRIEDMAN: It's not, nor is Number 6. The ordinance speaks for itself.

Nor is Number 7.

THE COURT: Let me just take 6 first.

The ordinance does speak for itself. Wouldn't that be, Mr. Karle.

MR. KARLE: That's correct, Judge.

THE COURT: I don't think – it may be a [p. 8] conclusion of law right now. I'm looking for findings of fact. I don't think that would be a finding of fact.

MR. KARLE: Okay. That's fine. We withdraw that.

THE COURT: So Number 5 and 6 – 7, it's a conclusion of law. It might well be both of them, not as a finding of fact. Well, may I make a suggestion, counsel? Rather than taking Number 7, why don't we make the pleadings actually part of the record?

MR. FRIEDMAN: They are.

MR. KARLE: They are anyways.

THE COURT: And matters before the Court so we can adopt them.

MR. KARLE: That's fine. If we want to strike –

THE COURT: I'll treat – this is argument, once the pleadings are in, we would be able to treat it as such.

MR. FRIEDMAN: Sure. The pleadings are part of the record.

THE COURT: For the Court's review purposes. And the Court would be allowed to – and any admissions – put it this way, and any admissions contained in those pleadings, the Court could consider same, is that correct?

MR. FRIEDMAN: That's correct, Your Honor.

[p. 9] THE COURT: Mr. Karle?

MR. KARLE: That's correct, Judge.

THE COURT: What about Number 8?

MR. FRIEDMAN: Number 8 we would not agree to.

THE COURT: Pardon me?

MR. FRIEDMAN: Number 8 we would not agree to. There is no evidence on the record to support that.

THE COURT: I think the only evidence I have now is what they said on the tape. If you have any other evidence, I'll consider it.

MR. KARLE: That's part of the record, Judge.

THE COURT: We have – I think the tape is going to be the evidence on that. I'm not going to.

MR. KARLE: I mean, that is made a part of the record, Judge. And our position is that is a fact that's been established in these proceedings.

THE COURT: We will have to consider it. It's part of the record and have to consider it as a proposed –

MR. KARLE: That's a proposed finding, there is evidence to support it.

THE COURT: I think the Court was in error.

MR. KARLE: All right. That's fine.

MR. FRIEDMAN: I would agree, Your Honor, that the play "Equus" played in October and November of 1994 at [p. 10] the Roadhouse Theater in downtown Erie. I wouldn't agree with the rest of it.

THE COURT: What?

MR. FRIEDMAN: I will agree that the play "Equus" has appeared in the City of Erie in the months of October and November 1994.

THE COURT: Wouldn't you agree no effort was made to enforce the nudity provision.

MR. FRIEDMAN: I have no idea. I have no idea.

THE COURT: They're saying that – can you offer any testimony to the contrary? I think we can accept it because there is nothing before the Court, at least that the Court is aware of, that would be opposed to this.

MR. FRIEDMAN: That's the point, there is no evidence on the record one way or the other if there were efforts made or not.

THE COURT: Maybe we have to take testimony.

If Mr. Karle states to me that there was no efforts to enforce that, I'm going to have to accept it unless you can offer testimony to the contrary.

MR. FRIEDMAN: I don't care. All I'm saying, there is no evidence on the record, whether they did or didn't is totally irrelevant. If they want to tell you they didn't – Mr. Karle, as far as I know, doesn't [p. 11] work for the Erie Police Department.

MR. KARLE: Your Honor, I think I have knowledge as to that fact. I'd be happy to put Mr. Villella on the stand and qualify him as a lay witness who would have such knowledge. If you would want to clean up the record to support this finding, we could do so in thirty seconds.

THE COURT: I think they could do that.

MR. FRIEDMAN: We could agree to it, I don't care.

THE COURT: We would agree that Number 9 would be part of the record.

MR. FRIEDMAN: Well, Your Honor, I don't know the significance.

THE COURT: You might not know the significance, we will make that ruling later, Mr. Friedman.

MR. FRIEDMAN: I understand they're saying "in a work of acknowledged artistic and social merit." Who is making – who is making that determination?

MR. KARLE: Your Honor, we would be happy to strike that.

THE COURT: All right. Let's strike that out.

MR. KARLE: Strike that language of "artistic and social merit." But I think the Court took notice,

judicial notice that "Equus" was here. If this is disputed, we will cross out "was performed," words – [p. 12] "nudity work was performed for several weeks," that's what we will put in, all right?

MR. FRIEDMAN: That's fine.

THE COURT: The one we didn't cover yet and we weren't sure we could agree on so far is Number 3. Let's take it sentence by sentence: "Until the effective date of the ordinance, Kandyland had advertised itself as the place 'where the whole wrapper comes off,' and featured no entertainment other than nude female dancers." Can you agree to that portion, Mr. Friedman?

MR. FRIEDMAN: I would agree to that, Your Honor. Well, I'll tell you what I would agree to, "and featured nude female dancers."

THE COURT: Anything else? All it says – nothing else. Do you have something else?

MR. FRIEDMAN: I don't know that, entertainment could be people talking to each other. They could be – entertainment could consist of talking to the people that work at Kandyland.

THE COURT: I think it would be live entertainment that – it doesn't say that. The Court would construe it to mean that, Mr. Friedman.

MR. FRIEDMAN: That's fine. The principle entertainment is nude female dancers.

[p. 13] THE COURT: And I can see why you would not want the next thing because that would be a

matter of fact, featured – "expressed a 'message of eroticism,' " right?

MR. FRIEDMAN: That's correct.

THE COURT: You are not agreeing to that, is that correct?

MR. FRIEDMAN: No.

THE COURT: I understand why. Let's try to dress it up now, gentlemen, if we can, please. The first finding of fact which the Court would go along with is actually almost part of the proposed stipulation previously. "One, the City of Erie Council enacted Ordinance Number 75 of 1994, Public Indecency, on September 28th, 1994, and became effective twenty days later after the signature of the Mayor." Agree on that, counsel?

MR. FRIEDMAN: Yes.

THE COURT: "Two, the Plaintiff is a corporation whose sole shareholder and director is Nick Panos. The corporation operates an establishment known as 'Kandyland' in downtown Erie, which is a Bottle Club featuring nude female dancers, unregulated by the Pennsylvania Liquor Control Board." You agree on that?

MR. FRIEDMAN: Yeah.

[p. 14] THE COURT: "Three, until the effective date of this ordinance, Kandyland advertised itself as the place 'where the whole wrapper comes off' and featured no entertainment other than – no live entertainment other than nude female dancers." You agree on that?

MR. FRIEDMAN: Yes.

THE COURT: "Number 4, the ordinance became effective – when the ordinance became effective, such dancers were required by the ordinance" – those words were added – "to wear, and continue to wear minimal articles of clothing such as 'pasties and G-strings' similar to such dancers in liquor-licensed premises throughout the Commonwealth." All right?

"Number 5" –

MR. FRIEDMAN: Your Honor, I don't – the end of that where it saves, "similar to such dancers in liquor-licensed premises throughout the Commonwealth." I don't have any firsthand knowledge of that, what the LCB may or may not require. I would not agree with that.

THE COURT: What?

MR. FRIEDMAN: I don't know that the last part of that where it says, "similar to such dancers in liquor-licensed premises throughout the Commonwealth." I don't know what their –

[p. 15] THE COURT: All right. We will get rid of that. I don't think that's really too relevant anyway.

Okay. What did we decide about Number 5 again?

MR. FRIEDMAN: We decided to strike that.

THE COURT: That's what I thought.

MR. FRIEDMAN: As well as Number 6.

THE COURT: Number 5 and 6 and Number 7.

MR. FRIEDMAN: And Number 7 we agreed that the pleadings would become part of the record.

THE COURT: Pardon me?

MR. FRIEDMAN: We agreed that the pleadings would become part of the record?

THE COURT: Part of the record concerning any admissions contained therein or other statements, is that correct?

MR. FRIEDMAN: Correct.

THE COURT: What did we agree on Number 8?

MR. FRIEDMAN: We agreed to strike Number 8. The tape speaks for itself.

THE COURT: All right. And Number 9. What we are going to do is add "The play, 'Equus' featured frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theater in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of [p. 16] the play." Is that correct?

MR. FRIEDMAN: That's correct.

THE COURT: All right.

MR. KARLE: Your Honor, if we revisit 8, I think we agreed otherwise.

THE COURT: Which one?

MR. KARLE: Number 8, that's our proposed finding of fact and it's supported by the record. That's what the City Council had said on the tape.

THE COURT: I think what I said though, Mr. Karle, we are going to have a transcript of that, I understand.

MR. KARLE: We do have, yes.

THE COURT: And that's going to speak for itself, really.

MR. VILLELLA: Yes.

THE COURT: Is there anything you can argue from that transcript? But the transcript will speak for itself.

MR. KARLE: All right.

THE COURT: Is there any other factual things that are in dispute that anybody wants to offer any testimony on?

MR. FRIEDMAN: No, Your Honor.

THE COURT: Mr. Karle?

[p. 17] MR. KARLE: No, Judge.

THE COURT: And there are no additional pleadings that anybody wishes to offer, is that correct?

MR. FRIEDMAN: That's correct, Your Honor.

THE COURT: Is there any additional discovery that anybody wishes to take or make?

MR. FRIEDMAN: No, Your Honor.

THE COURT: Counsel, it appears to the Court that the record is completed. There is one gentleman in the courtroom who has asked to address the Court. I'd like to make this statement part of the record, does anybody have any problem with that? Mr. Morton.

MR. FRIEDMAN: No, Your Honor, no problem.

MR. KARLE: We have no problem, Judge.

THE COURT: Mr. Morton, come forward and give us your name. your address and who you represent.

MR. MORTON: Thank you, Your Honor.

THE COURT: And who you represent.

MR. MORTON: Afternoon, Your Honor, counsel. My name is Bill Morton. I'm here this afternoon representing the Erie Playhouse and the Roadhouse Theater, and I've been asked by these two organizations and at the request of the Court to make a presentation on behalf of what the arts community or my clients believe the effect and enforcement of this ordinance [p. 18] will have on future productions.

Between these two organizations, Your Honor, the Erie community is presented with a variety of theatrical experiences. These range from light hearted family fair [sic] to serious avant garde productions addressing and commenting on serious and novel social issues. This Court requested the input of the arts community regarding the effect the enforcement of the City's ordinance will have on the arts in Erie.

Your Honor, the enforcement – strict enforcement of the City's ordinance will have a profound and chilling effect on the organizations I represent and the Erie Arts Community as a whole. We appreciate the City's position that it does not intend to enforce the ordinance against the arts community. However, the current administration's promises are not binding on future administrations. As long as the ordinance is on the books and can be

enforced, it will have a negative impact on the arts in Erie.

Each year the Playhouse and the Roadhouse goes through a painstaking process to decide the plays that they will present to the Erie community. Before the ordinance, the selection committee made its decision based on the artistic merit, social impact, the entertainment and production values alone. Now we must [p. 19] be concerned with potential enforcement of the City's ordinance and the impact its enforcement may have on any production that contains any nudity or any touching.

The Playhouse has performed productions like "Hair" and "Bent." The Roadhouse recently performed "Equus". Each has nudity and strong adult content. The decision regarding nudity in each performance was up to the director's and actors' interpretation. The decision was not affected by a government imposed standard that is subject to varying interpretations by government officials who do not share the same opinion regarding the artistic, literary, social content or importance of the production as the members of the public, the cast and the production staff. Should an important production be stopped or not presented because one or two members of a government organization with the power to enforce the laws believes it lacks serious artistic, literary or social content? My answer is a resounding no!

The Playhouse should not be forced into the position of defending any production that it presents. They should not be forced to adopt contingency plans in the event that a government official tries to close a play or arrest a member of a cast or a director. That [p. 20] act alone stops

the production, damages the organization and forces the expenditure of scarce funds to defend against the government action. As long as these possibilities exist, they chill my clients' freedom of speech and expression. The presentation and subjective interpretation of a play is a guaranteed constitutional right.

The possible enforcement of this ordinance gives the government the power to affect the essence of our constitutional liberties, to free speech expression and presentation of thoughts and ideas. Any infringement on that right by the government, however slight or however well intentioned, cannot be tolerated by a free society.

Accordingly, I ask this Court on behalf of my clients, the Erie Playhouse and the Roadhouse theaters, to strike down the ordinance and give the protection to the arts community.

Thank you, Your Honor.

THE COURT: Thank you. Before you leave, Mr. Morton, I'm sure Mr. Friedman has no comments. Mr. Karle, number one, do you object to making that part of the record, the statement of the Playhouse?

MR KARLE: No, Judge, I certainly don't object to that part of the record.

[p. 21] THE COURT: And also would you want to respond to that right now, or do you want to respond to it in your oral argument later.

MR. KARLE: If I could briefly right now, I would like to address Mr. Morton's concerns. And I'm sure he's carefully reviewed the ordinance, and I'm sure

he's noted the severability clause and the construction clause in the ordinance. Our intention was, and it's the City Council's intention not to infringe on constitutional rights to the extent the Playhouse is doing productions which can – which content or which conduct can be construed as a protected performance. Certainly, we don't think this ordinance applies, it's been our – it's been our position that it doesn't apply. We would just like Mr. Morton or his clients to realize that and perhaps review the severability clause and look at our position in light of it.

MR. MORTON: We will, Your Honor. Your Honor, I mean, we have reviewed the severability clause, we are aware of it, we appreciate the fact that the City put that in. It still comes down to the point of who is going to make the decision, who is going to decide what play, what production has serious literary, artistic and social content that's deserving of protection and what isn't. If the ordinance isn't there, then we [p. 22] don't have that concern. As long as the ordinance is there, somebody in government has the power to make an interpretation. They might be wrong, it might be against the weight of legal and social opinion, but it can still have a chilling effect and create a severe economic hardship for this – the specific organization.

THE COURT: I think I have your position.

MR. MORTON: Thank you.

THE COURT: The attorneys went very far to have you make your speech and make that part of the record.

MR. KARLE: Your Honor, if I may respond?

THE COURT: Sure. You have a right to respond.

MR. KARLE: If I can respond, this ordinance – there are some similarities to the enforcement of obscenity laws. There is a measure of subjectivity to it. And, of course, the reason for that is just that the elusive nature of the First Amendment, it's difficult to define and to get a hold of. But if I can draw the analogy, Judge, with obscenity laws, there are obscenity laws both in state and – in ordinance and in statute and they are enforced in a subjective manner. But nonetheless, that doesn't mean they're enforced incorrectly or in a wrong fashion, and I think that Mr. Morton should appreciate that application.

[p. 23] THE COURT: Okay. And the Court truly appreciates what the City has done so far, and I think we have that part of the record. Thank you very much, Mr. Morton.

MR. MORTON: Thank you for the opportunity.

THE COURT: Mr. Friedman, do you have any questions you want to ask Mr. Morton?

MR. FRIEDMAN: No, Your Honor.

THE COURT: Do you have anything else you would like to ask, Mr. Karle?

MR. KARLE: No Judge.

THE COURT: Again, I'll be addressing my remarks to Mr. Karle, but, Mr. Villella, please feel free at any time to also be allowed to speak in this matter.

It would seem to me at this stage that we can go right to oral argument. Is that correct, is there anything else?

MR. FRIEDMAN: Yeah, that's fine, Your Honor.

THE COURT: I would – I would like you to address one other thing. I would like you to address, along with everything else, whether or not, in your opinion, the Court has the power to strike certain provisions or to modify the ordinance in any way whatsoever to make it meet the requirements of "Equus" or "Hair" or something else, or any other thing or purpose the Court might so feel appropriate. We have done some research, [p. 24] but I would like to hear from counsel as to what their thoughts on it are plus everything else. If you want to have some time limits, counsel. If you give me a reasonable time, we will let you have that time.

MR. FRIEDMAN: I'm not going to be long, Your Honor.

THE COURT: All right.

MR. FRIEDMAN: Should I proceed, Your Honor?

THE COURT: Sure.

MR. FRIEDMAN: Your Honor, as I sat here and listened to the last exchange, the arts community coming in here and saying strike down this ordinance because the ordinance prohibits nudity, period. Mr. Karle has the nerve, the absolute gall to say, "Don't worry, Playhouse, the City is here to sever off anything that it thinks is appropriate. So, if we think you are having an appropriate production up there, we are not going to take any action against you. Isn't that nice in a free society to have

somebody such as the City Solicitor to review everything for you and me and all these people and tell us what's good and what's not good. We can have some kinds of nudity but not other kinds of nudity, so sayeth the City. Isn't that great in our society when we have the City to look out for us, to tell me what I can see, to tell my [p. 25] family what they can see. Isn't that wonderful in a free society, Your Honor? And that's the whole problem with this ordinance.

The question the Court has to decide today is whether the Bill of Rights is alive here in Erie County.

THE COURT: Excuse me, gentlemen, just so you know, there is no way the Court is going to decide this case today. I will tell you and anybody else present in the courtroom, it will be at least three to four weeks from the time of this hearing, partly because of the holidays and partly because the Court must research this. And we know we have various Federal cases and State cases which the Court must try to analyze and apply the appropriate law. So, we will be probably looking three to four weeks at the maximum.

MR. FRIEDMAN: Thank you, Your Honor.

The question is whether or not four members of City Council versus two members of City Council can say, "People of Erie, you can see this but you can't see that," or whether it's the Constitution that prevails; whether this is a free society. We as individuals have the right to express ourselves and the right to view activity which is protected by the First Amendment.

[p. 26] This ordinance is not an obscenity statute despite the City's position. That's one of the problems with it. It doesn't anywhere – or the state statute on obscenity – it doesn't have any of the safeguards of the Obscenity Statute. It doesn't comply with Supreme Court rulings on obscenity. What it does is it makes nudity illegal, period, in a public place, and a public place is defined widely, broadly. A public place could include a locker room, it can include a theater, it can include my client's place of business, it can include just about everything outside of the home. And what it says plain and simple is nudity is a crime in the City of Erie in any public place, period. It's not a zoning ordinance, it's not a liquor control ordinance, it's an ordinance enacting social policy as it was seen by four members of City Council, and that's all it is.

Kandyland presents nude dancing. It doesn't force people to come in to its establishment, it doesn't go out on the street and expose nudity to the public in general. It provides entertainment in the form of nude dancing to adult individuals. It doesn't serve alcoholic beverages. It does permit alcoholic beverages to be brought on to the premises. That is not a violation of the law, it's not a violation of any zoning ordinance.

[p. 27] Your Honor, dancing in the nude is entitled to First Amendment protection. The Supreme Court has said so. This Court has said so, that is a given.

Our first contention, Your Honor, today is that this ordinance violates freedom of expression as guaranteed by the First and Fourteenth Amendment.

THE COURT: Which is the right to dance in the nude?

MR. FRIEDMAN: That is correct, under the First and Fourteenth Amendments to the United States Constitution and under Article I, section 7 of the Pennsylvania Constitution. The City relies upon the *Barnes* decision, and we have been over this and over this and over this. What does *Barnes* stand for? *Barnes* is a plurality decision, it commanded no majority position. The only opinion to garner another vote was the dissenting opinion. The opinion garnered three votes for the Court opinion, one vote for Justice Souter's concurring opinion and one for Justice Scalia's concurring opinion.

The Court is familiar with the Court's decision in *Triplett* and the 6th Circuit Court's decision in *Triplett*. I would suggest to the Court the best decision is the Court's decision in the *Triplett* case.

THE COURT: I think I said that last time because [p. 28] it agreed with you on that.

MR. FRIEDMAN: And that was correct.

THE COURT: At least I was correct once in this lifetime.

MR. FRIEDMAN: It's great.

Your Honor, go back, read the testimony of the members of City Council, look at the tape. All you really need to do is read the transcript and you tell me in there what was the intention of the members of City Council in enacting this ordinance. It is clear. It couldn't be clearer what they're trying to do is they're taking their own position on what they feel is a morality question and

they're going to impose it upon everyone else whether they like it or not, period. They're saying our morals – tell us that it is not okay to view a nude dancer. It's okay to view if you have a pasty on, but you can't view a nude dancer. The church tells us this, our own teachings tell us this and this is what we want you, the people of the City of Erie, to do. Four of us agree on this. Four of us voted in favor of it, two of us voted against it.

In my brief, on page ten, I go over some of the comments that were made, and I'm not going to read them all to you. But each one of the City Council went through and said these are the reasons we did it, and [p. 29] each one of them cited morality positions and only morality positions to support their positions. They never talked about any secondary effect as required by the Court in *Triplett*, none of them were concerned about it. What concerned them was they wanted to impose their own morality views on everyone else, and there is exactly what the District Court said was totally improper.

The 6th Circuit said there was language that there was evidence presented to the District Court from which the District Court should have concluded that there were indeed secondary effects considered by the City Council of Akron. In this case there is no mention of any secondary effects. The only place any secondary effects appears is in the ordinance itself and that is just a subterfuge, Your Honor, that was put in there by the solicitors when they drafted this. I doubt that the City Council members even read it, number one. But if it was so important to them, if that's why they enacted this ordinance, why didn't they say so? Why is there no testimony to that? Why didn't the City bring in the City Council people?

THE COURT: Mr. Friedman, what I have now is – you can't argue what their intention was because you closed the record on me.

[p. 30] MR. FRIEDMAN: That's correct, Your Honor.

THE COURT: And we have what they stated and we have what the thing stated. I really think it inappropriate for you to tell me what they intended because I have no evidence of that other than what they said there.

MR. FRIEDMAN: That's what I'm suggesting what they intended is exactly what's on the record, that's my position.

THE COURT: Well –

MR. FRIEDMAN: Your Honor, under the Pennsylvania –

THE COURT: Also they did sign the ordinance. You have to assume they signed in all fairness, you have to assume they read the ordinance before they signed it.

MR. FRIEDMAN: They didn't sign the ordinance, only the council president signed the ordinance.

THE COURT: He was authorized to sign.

MR. FRIEDMAN: Yeah, he signed it. Under the Pennsylvania Constitution there can be a higher standard imposed. And I would suggest under the case law that Pennsylvania places a great deal of importance on First Amendment rights, on the freedom of expression. It's enacted as part of the Declaration of Rights over two

hundred years ago when they enacted the [p. 31] Pennsylvania Constitution. And I would suggest in construing the Pennsylvania Constitution that you look to the most well reasoned opinion in their entire case, and that is Justice White's opinion in *Barnes*, the dissenting opinion which was joined by Justices Marshall, Blackmun and Stevens. And if you read it, you'll see that it's the opinion that makes sense. In that opinion they say that nude dancing is protected. The majority agreed with that as well. And they go on to say.

THE COURT: I can see. Don't you think I'll read it?

MR. FRIEDMAN: Yes, I don't have any doubt that you've read it already several times.

THE COURT: I have.

MR. FRIEDMAN: But nude dancing is protected by the freedom of expression.

The problem that the City of Erie has is not with nude dancing, the problem that they have is the message that it communicates because that becomes obvious – and when you read the dissent, that's what they talk about. It becomes obvious because the City is not concerned if there is [sic] pasties involved, and the City tells us, "Well, we are not concerned if somebody in "Equus" appears nude or somebody in "Hair" appears [p. 32] nude." What is it about nude dancing that bugs them so much? I tell you the only thing it can be is that it conveys a message that they don't like. And that's what the dissenters say, "You can't go in and legislate to stop a message." That's the only thing they're trying to do is stop the message

that nude dancing conveys, and that, I would suggest to the Court, is the interpretation that the Court can and should give under the Pennsylvania Constitution.

Your Honor, I don't think there is any question but that that ordinance is Constitutionally overbroad. The 6th Circuit said, – the City has alluded to it because they keep saying, "Well, maybe that's what it says, but we won't really enforce it that way. Trust us, we will do what's right for the people. We know what's best for you people." That's what they're saying. When they say that, they're admitting to the Court that it's overbroad when the ordinance goes through and says "nudity is prohibited." It's prohibited for a woman to nurse a child over two years of age. She is going to be arrested for that?

The ordinance clearly applies to the Playhouse, clearly applies to the Roadhouse. There is no way you can argue against that by going back and saying, "Well, there is a severability provision that says if it's not [p. 33] constitutional." It doesn't. It's not going to be applied that way. Well, what does that mean? I mean, that really begs the question. The ordinance says it's a violation to appear in a state of nudity.

THE COURT: What right do I have to modify the ordinance?

MR. FRIEDMAN: That's what the City wants you to do.

THE COURT: The Court does not – under case law do I have right to do that?

MR. FRIEDMAN: There is a Supreme Court case, Your Honor, which I cited in my brief, Justice

Roberts' opinion which says that, "The Court ought not to legislate. The Court's job is not to tinker with statutes." And that case is *Commonwealth versus MacDonald*, Your Honor, it's on page 6 of my brief. The Court – the City wants the Court, I suppose, to come back in and re-write the statute to their liking.

Now, I'm not sure exactly what the Court is supposed to do to do that. Is the Court supposed to go over to City Hall and sit down with the four majority members at a round table and say, "This is what we really want to do, Judge. We know you are a fine Judge and were a lawyer for a lot of years and, Judge, you sit down and write it for us." Where are we supposed to [p. 34] go for an interpretation of the ordinance. The Court's job is not to write ordinances. The Court's job is to interpret it.

The Court has to consider the intent of the members of City Council. Let me read you, Your Honor – there is – I gave you my transcript. Your Honor, as the Court will recall, this ordinance was sponsored by Councilman Thompson. He's really the one that pushed this ordinance through. This is what he said was his intent in doing this ordinance, he says on page 5 of the transcript that: "The City is merely reaffirming state laws." More importantly, this is what he says, he says, "This ordinance specifically talks about indecent behavior, lewd and immoral. And if you look up lewd in the dictionary, it's lust, vulgar, worthless, obscene. And obscene if you look it up in the dictionary says it's indecent, repulsive, disgusting, and sexually exciting. That's what we're talking about. That's what we're prohibiting. We're not prohibiting nudity, we are prohibiting nudity when it's used in a lewd and immoral fashion." That's not what the ordinance says,

but that's what the sponsor intended when he proposed this ordinance.

Now, Your Honor, if you are going to sit down as a Judge and draft a new ordinance and consider the intent [p. 35] of the sponsor of this ordinance, Mr. Thompson, then I would suggest to the Court that what he intended to do and what he said was to reaffirm the State Obscenity Statute and to create a statute which he says does not just prohibit nudity, it prohibits nudity when it's used in a lewd and immoral fashion. If the Court is going to sit down and redraft this, I would like to know what the Court is going to base it on? Who is going to have input into it? And is the Court going to be a legislature, and if so, and if the Court adopts it, who are we as litigants going to go before for an interpretation? Who is going to rule on it? And that's what Justice Roberts talks about in his opinion. He says it's up to the Court's [sic] to interpret, not legislate.

Your Honor, the final issue which I would like to address this afternoon is the preemption question, and I'll allude to it. The State enacted an Obscenity Statute, and that's at Title 18, Section 5903. The Obscenity Statute was amended in 1990 to include subsection (a)(5) which applies to performances where there is nudity involved. The word "performance" was specifically added to the statute in 1990.

The Obscenity Statute applies to nude dancing under certain circumstances, and that is when the [p. 36] dancing is obscene as defined by the statute. The City cannot enact an ordinance which is inconsistent with the state Obscenity Statute. The City has relied upon subsection

(k) which says that the City retains power to legislate in this area, but the language of subsection (k) says it has to be consistent with state law.

In addition, under the Third Class City Code the City does not have the power to enact an ordinance which is inconsistent with a state statute. This ordinance is totally inconsistent with the Obscenity Statute because it doesn't have any guidelines. It does – it makes nudity an offense. It does not have the requirements of obscenity as required by the state statute. In addition, the state statute requires a jury trial. The City ordinance does not provide for a jury trial. Under the law it is legally inconsistent. The state Obscenity Statute preempts this ordinance and the ordinance should be invalidated.

Your Honor, this is a highly emotional issue. It's a fascinating legal issue. But the real question is, is the Court going to permit the people to make their own decisions as to what they should do, what they should see, what type of activity they can engage in when that conduct is not obscene, when that conduct [p. 37] is protected by the First Amendment? Is the decision going to be left up to the individual or is it going to be left up to the City of Erie?

Your Honor, I would ask the Court to strike the ordinance. It's unconstitutional under both constitutions and it's been preempted by the state statute. Thank you, Your Honor.

THE COURT: One thing else, Mr. Friedman – again Mr. Karle, there is some question on the rules with a case involving freedom of expression. An opinion should be possibly filed in three to five days, would you

be willing to waive that requirement so I would have the period of time necessary to write a full scale opinion? I think you both want that because this way – otherwise it's going to be a handwritten opinion without much legal definition to it. Do you have any problem with that, Mr. Karle?

MR. KARLE: No, I don't have any problem with that.

THE COURT: Do you have any problem?

MR. FRIEDMAN: No.

MR. KARLE: I think that's to hold a final hearing.

THE COURT: Pardon me?

MR. KARLE: Isn't that where you issue the [p. 38] preliminary injunction or refrain from it if it gives you three days for a final hearing. I think we are beyond that anyway. We waive it.

THE COURT: This way we will waive it.

MR. KARLE: That's fine.

THE COURT: Mr. Karle, or, Mr. Villella, you want to go next?

MR. KARLE: I would like to thank Mr. Friedman for elevating me to the status of the censor for the City of Erie, but unfortunately, I can't agree with his opinion.

THE COURT: He elevated me to the legislature too.

MR. KARLE: I'm not the last word in that regard, and maybe that's how we ended up here, Judge.

THE COURT: Maybe we should consider the source before we take credit for those.

MR. KARLE: Yes, sir. Judge, you indicated that you wanted to talk about or have – entertain or hear argument on the construction of an ordinance. I know Mr. Friedman has cited Justice Roberts' opinion, but we are of the opinion that we are here today, and part of the our [sic] argument – one of our arguments is that as a state court you are obligated to construe legislation to preserve it against constitutional attack and you have to sever any unconstitutional provisions and that [p. 39] is our argument here.

Mr. Friedman alluded to the fact that what's bugging him, or what's bugging the City is the message we are conveying today, or we were conveying, or their clients are conveying. The odd thing about this case, Judge, is we haven't heard one bit of evidence from the plaintiff as to what message they're protecting. Specifically, Mr. Friedman went to great lengths to strike our proposed finding of fact concerning the erotic message, he struck – he stressed we wanted language in the proposed finding of fact that suggests that their clients, through the dancers, are expressing a "message of eroticism." He struck that. He didn't want to make that part of the message – part of the record. What message? What right is he – is being protected here, Judge. He's really advancing, not his case or his client's case, but he's advancing the Playhouse's case, the arts case, the case of those

people that would be performing what I would term high, higher forms of expression.

THE COURT: Excuse me. One thing I never thought of, just now, I was on the Playhouse Board, would that cause any problems with anybody here?

MR. FRIEDMAN: No, Your Honor.

THE COURT: Mr. Karle?

[p. 40] MR. KARLE: No, Judge.

THE COURT: It was quite a few years ago.

MR. KARLE: No, Judge. Now, since the plaintiffs are really essentially asserting the rights of the Playhouse and the Roadhouse and they're concerned with the productions of "Hair," "Equus," that's where we believe the severability clause is important in the statute. If the Court is concerned with those rights, it's not Greg Karle saying we are not going to enforce these – this ordinance –

THE COURT: Isn't it more – Mr. Karle, isn't it more than separating? Don't I actually have to write – this is what bothers me, wouldn't I actually have to write an ordinance saying we have to – I hereby amend the ordinance, "That this ordinance not sever, but not include?" I can't strike words out, I have to actually add my own words and say, "This ordinance does not include 'Equus' or a play sponsored by the Roadhouse or the Playhouse." Isn't that what I have to do?

MR. KARLE: Yeah, Your Honor, and I think you are empowered to do so.

THE COURT: I might say I can knock out language and say this language is not is knocked out because it's unconstitutional. What I'm really having to do is [p. 41] not knock out language, I'm having to insert language, isn't that correct?

MR. KARLE: That's correct, Judge.

THE COURT: Okay.

MR. KARLE: You would be holding that the ordinance is not applied against certain performances.

THE COURT: Okay.

MR. KARLE: Certain expressive conduct.

THE COURT: Okay.

MR. KARLE: That would be our position. And it would be our position that under the case law in Pennsylvania you are perfectly – it's perfectly allowable.

THE COURT: I assume there is [sic] cases in your brief that discuss that?

MR. KARLE: Yes, Judge, the *Hughes* case.

MR. VILLELLA: Several cases.

MR. KARLE: There is a number of cases, Judge.

THE COURT: We just received that so we haven't had a chance.

MR. KARLE: Judge, yes, we have touched on that area in our brief. And if I might, that is one of the distinctions we can draw between this case and the Akron case. When it was ultimate in review, when *Triplett*

– the Akron case was ultimately reviewed by [p. 42] the 6th Circuit, the Court went to great pains, and if I could, Judge, if you bear with me, their language is quite – I'm referring to my brief, Judge, "The *Triplett* Court recognizes the most critical distinction between federal courts and state courts dealing with state and local laws, as previously discussed herein."

The Court in *Triplett*, the 6th Circuit, said, "While loath to find that the Akron public indecency ordinance violates the First Amendment, this Court is unable to supply a limiting construction for the regulation. It is well recognized that federal courts do not rewrite statutes to create constitutionality." That is a critical distinction here. In *Triplett* the Court was handcuffed, they couldn't construe the ordinance.

THE COURT: Are you saying what they said in *Triplett* was the federal court could do it but not the state court?

MR. KARLE: That's correct, Judge. That's correct. As I read the 6th Circuit case in *Triplett*, the language suggested to me is that the Court would love to do it, but can't. And I think that's a real distinction here, that's a real important distinction which really neutralizes the *Triplett* case.

If I can talk about – we obviously disagree as to [p. 43] the impact of the evidence and the tapes – the evidence adduced at the last hearing, which was introduced here, as to the City Council's legislative attempt.

THE COURT: If I could interrupt for a moment.

MR. KARLE: Yes.

THE COURT: Just so you know, I'm not saying I won't do it. I have great hesitancy to change or modify a statute. If you've read my opinions in the last nine years, I've repeatedly stated that I don't want to be a super zoning body, I don't wants [sic] to be a super school board, I don't want to be a super city council. I would have great reluctance – I'm not saying I won't do it. If the law is clear, that's where I generally come from, and I have written numerous opinions that state that.

MR. KARLE: Your Honor, I don't think we are asking for a radical departure. We have language in the severability clause which recognizes First Amendment rights. As I indicated earlier, that's a very elusive concept. How do you detail them? How can you spell them out and enumerate them all? No, you can't. So we have to depend, and sometimes have to depend on the courts for interpretation.

I think the concerns that have been brought out [p. 44] here is that the arts are protected, a higher protected form of expression. I think that the Court could acknowledge that, that protected speech, or that higher form of speech and incorporate that into its – the Court's decision.

THE COURT: Okay, fine. Thank you.

MR. KARLE: If I can, Judge, we were talking about the record and the evidence from last hearing. I don't know, I must have been at a different hearing, because I noted that the record was replete in the council's – from the council meeting with references to secondary effects, most notably, Mr. Bagnoni's opinion. He

was very concerned with what would happen to a neighborhood because of these establishments. He touched on the criminal aspect and the rape aspect, all kinds of issues, all kinds of criminal activity. So we saw a different case, we saw different testimony. And we would like the Court to consider that as – that testimony in support of the secondary effects aspect of our case.

Your Honor, as we have raised earlier, we still see a significant standing issue in this case. Traditionally, a plaintiff may invoke the First Amendment rights of others without those individuals being present in a lawsuit.

[p. 45] In the facial overbreadth area we see a problem with their case. First of all, all we have is Kandyland as a plaintiff. We have heard no testimony from that individual. All we have seen is the pleadings which allude to a commercial – some sort of commercial harm if this ordinance is enacted. We have not heard from any other alleged plaintiffs. We haven't seen any dancers. We haven't heard any dancers – heard from any dancers. We don't know what expression is being affected.

Now, the one exception to standing in facial overbreadth is not allowing standing. I mean, we have alluded to this in our brief, and we touched on this in *Broadrick versus Oklahoma*. And what *Broadrick* stands for is if an area of speech or First Amendment is not a traditional area of speech, but if only conduct is being affected, the plaintiff may not invoke standing or lawsuit on behalf of other plaintiffs not a party to the case. That's their present factual situation, Judge.

THE COURT: I'm having a little trouble with this. May I ask a question, please?

MR. KARLE: Sure, Judge.

THE COURT: Assuming the owner of that establishment says, "I really believe in nude dancing. [p. 46] I think it's something that should be shown." Isn't that a First Amendment right in your mind if he wants to do that? He's not the dancer, but his belief is that that is something that should be shown to the public.

MR. KARLE: Would I say it's pure speech, Judge? No, I would absolutely not say it's pure speech. Is there an issue – is there a possibility that that is some sort of expressive conduct? Perhaps. And that's my point here, Judge, if we are not in the area of pure speech, the plaintiffs can't invoke, they don't have standing to pursue the case on the dancers, the patrons or whoever else that is not a party here.

THE COURT: Well, I have to decide it strictly on the owner. I have no – it can't be decided at this stage on the dancers because they're not parties and not named, and it can't really be decided on the patrons. Looking from the owner standpoint, if he wants to do this and he feels that he wants to express it – it's similar to a nudity camp, could he have a nudity camp if he believes in this? I'm not saying I believe or anything, but this is what he believes, I guess.

MR. KARLE: That's one of the problems in this case, what's the expressive conduct? What's the [p. 47] speech? What is the First Amendment? What's the gravamen of this case, Judge? They haven't enunciated here.

All I can see from the pleadings is there is probably a commercial interest here that is being impacted. There is no other evidence here.

Finally, Judge, this ordinance is constitutional under *Barnes*. I know Phil doesn't like *Barnes*, Phil likes *Triplett*. But the fact of the matter is, Justice White's opinion isn't the law in this case, the majority is. I read the whole situation differently, Judge. I don't see where you have a constitutional right to be nude in public, it doesn't stay [sic] that. Perhaps you have a right to express an erotic message nude, but there is no absolute right to be nude in public. I haven't seen one case on that.

What *Barnes* stands for is that the City can allow – can require a small amount of clothing and that does not impinge on or prohibit the erotic message of a dancer, period.

THE COURT: That's what Souter said, basically.

MR. KARLE: Well, yes, that's correct, Judge, and that's the justice – plurality holds that opinion also. Contrary to Mr. – to Phil's argument that the Pennsylvania Supreme Court may grant some sort of higher right, we don't see it, Judge. There is not one [p. 48] case in Pennsylvania which grants some sort of protected status to nude dancing. There isn't any case. We haven't found any cases.

And finally, the Obscenity Statute, and we have cases – the Obscenity Statute, the Pennsylvania Obscenity Statute does not preempt this area. If you can give me a moment. Mr. Friedman used the term "consistent with this chapter." That, Judge, has been interpreted to mean

that local communities are prohibited from enacting more permissive ordinances.

Judge, this is not a more permissive ordinance, this, naturally, would be stronger. Nonetheless, it doesn't preempt the Obscenity Statute – statute does not preempt our ordinance. I believe the statute, or the case that Mr. Friedman referred to was a pre-*Miller* statute and simply doesn't apply to the present state of the law.

Finally, Judge, we would argue that the *Barnes* case is the prevailing law. If the Court sees fit, it could construe our ordinance and grant to the protected – or to the higher arts the exemption from the ordinance. We just ask that the Court find that the ordinance is valid constitutionally.

THE COURT: Thank you.

MR. VILLELLA: Your Honor, I can supplement a [p. 49] little bit further.

THE COURT: You want to say something?

MR. VILLELLA: A couple things.

THE COURT: Fine, Mr. Villella, we appreciate it.

MR. VILLELLA: If you don't mind, I have a couple things to add.

MR. KARLE: No, go ahead.

MR. VILLELLA: May if [sic] please the Court. Your Honor, you are very concerned with whether or not you have the power to construct or sever – construct or sever statutes. In Pennsylvania you not only have the

power, you have the obligation to. You must look at statutes, interpret and construe and sever when necessary. What you don't have the power to do is what Mr. Friedman is suggesting. We are not asking you to reconstruct statutes or legislation. Of course, you don't have the power to add things to statutes and ordinances to make them apply where they don't apply. If there is a law, for instance, that says you can't wear colored hats, where would I sever the statute? You would say it doesn't apply in the situation XYZ, that's what you do.

THE COURT: Then I'm construing it, Mr. Villella.

MR. VILLELLA: Of course you are.

MR. KARLE: Right.

[p. 50] MR. VILLELLA: That's what you're obligated to do. It says in the Statutory Construction Act as well as in the ordinance you must do that. The courts have – the Pennsylvania Courts have done that repeatedly. In the case, the *First School* case, in which they were dealing with the requirement of no aid to private schools, the Court says, "Well, that does not apply to non-religious private schools, we sever out – we severed out non-religious schools from the provisions even though the provision doesn't say that there was another case as – condemnations as to whether or not you can get delay damages if you are still in possession." If you look at the word "possession," they said "want." This is what they really mean. Otherwise you have an unconstitutional taking of property.

Judge, the First Amendment and other constitutional issues are precisely the reason why you have the Statutory Construction Act and construction and severance language in the legislation. Now for my example here, say you have a law that says you can't wear colored hats on the street on Thursday, whatever. Someone gets smart and says, "I'm wearing a scarf. It's not a hat, it's a scarf." The Court is not empowered to say, "Well, it's [sic] really applies to hats and scarfs." You have to construe a statute so it [p. 51] doesn't reach beyond where it says it reaches.

We are saying to you that the law, the general prohibition of the law may not apply in certain contexts. That's precisely why you are there as a Judge, that's precisely, Judge, the legislators said what they did. Mr. Friedman and Mr. Morton acted like we invented this public nudity regulation in Erie, PA or Akron, Ohio. That we are the only ones dealing with this and that we are a bunch of corn pone folks eating crackers and we have don't know what we are doing.

MR. FRIEDMAN: I won't disagree with that, Your Honor.

THE COURT: Let's keep the remarks –

MR. VILLELLA: Judge, these laws are all over the country. As you can see from our brief, federal courts uphold them, the state courts uphold them, elsewhere. You saw this in a law review from the Dickenson's [sic] Review suggesting an ordinance very similar to ours. As a matter of fact, with even less construction language then [sic] ours.

THE COURT: That was written, I believe, before the Circuit case and *Triplett* came out, if I'm not mistaken.

MR. VILLELLA: Look at – *Triplett* is a case why ours is good and their's [sic] is not. The *Triplett* – that [p. 52] was a federal court, you are a state court, the ordinance did not contain the same types of limiting provisions as ours did, and that federal court declined to exercise any kind of construction or severance. If you don't do that here, if you think there is application that should be severed and you don't sever it you simply throw the whole thing out. You have to look at whether or not you are complying with the Statutory Construction Act and doing what you are supposed to be doing as state court Judge. It's impossible to list – make a list in the ordinance to say, "Well, it doesn't apply here exactly. Here is a list of plays it doesn't apply to" You can't do that. And the federal courts – you'll see the decisions have said that you just can't, you can't.

THE COURT: That's what bothers me. I don't see how I can do it.

MR. VILLELLA: Well then, if you are not sure you can sever out applications of law, it says in the Statutory Construction Act you must sever unconstitutional applications as well as part and portions of law. You must look to where it applies and say where to [sic] doesn't apply here.

THE COURT: Could I say it doesn't cover any theatrics?

[p. 53] MR. VILLELLA: If you say something like that –

THE COURT: If I thought that, wouldn't that be way to [sic] broad, "theatrical performance," and later on instead of Playhouse we have somebody else, a well respecting community puts out a performance; "We are a theater. We can do it because we are a theater." And your interpretation doesn't include theater.

MR. VILLELLA: The language has been suggested to you in the brief as well as in the decisions of the other cases.

THE COURT: Okay.

MR. VILLELLA: As to what you would say as to how the application –

THE COURT: I think we have enough argument on that. Go ahead, move on.

MR. VILLELLA: I think that's really all. Mr. Karle covered it well. Otherwise, if the message – they're saying we can't censor the message if the message is something that entices secondary effects, it promotes prostitution or sexually transmitted diseases. We certainly can and should put at least a small limitation on the transmission of this kind of a message. We have the right to do it. We have the obligation to do it.

THE COURT: Mr. Friedman, you make it very short.

[p. 54] MR. FRIEDMAN: Sure. Your Honor, if you believe that line, then pasties prevents sexually transmitted diseases, that's the cure-all. You put pasties

on and that makes all the difference in the world, if you accept the City's position. That's silliness to say the least.

Your Honor, it bothers me when I hear talk about higher expression. If you live out in Fairview, maybe you are allowed to come in and view "Equus." If you don't and you want to go to see a nude dancer, we don't allow that. You asked Mr. Villella repeatedly what do I put in, and Mr. Villella's position is, "Judge, you'll know it when you see it. It's the higher forms of expression that are protected, not the lower forms." And who is to decide that? Me? You? Mr. Villella? Mr. Karle? Some unknown person? How are you going to write what this person thinks? What are you going to put in use? Mr. Thompson's language lists specific plays. Is Mr. Morton going to come in to you or to Mr. Villella and Mr. Karle and ask them before the play puts on to decide whether this is protected speech; no, this isn't protective speech?

It's a censor board, that's all it is. Your Honor, this was summed up tremendously in the – by the Second Circuit in the *Salem* case in which I cited, [p. 55] which the Supreme Court affirmed. What they said was, "While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by the judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some 'entertainment' with his beer or shot of rye." That's what we are talking, nudity is nudity is nudity, and this says that all nudity is unlawful and it's unconstitutional.

Thank you, Your Honor.

THE COURT: Anybody else have anything to say?

Just for the record and for those people who are here on behalf of their respective clients and the media and so forth, I think all should know this, that the Court in rendering this opinion would not in any way be expressing its opinion on whether he believes or doesn't believe in nude dancing. The question solely before this Court is whether or not the statute is constitutional or whether it's been preempted or for some other reason it's been stricken. The Court must be very circumspect in terms of imposing what it believes in, and it does have strong beliefs at times and to any other statutory instruction.

[p. 56] With that in mind, anything else anybody else wants to put on the record?

MR. FRIEDMAN: Nothing further, Your Honor.

THE COURT: Mr. Villella?

MR. KARLE: No, Judge.

MR. VILLELLA: Nothing. That's all.

THE COURT: We will shoot for three to four weeks getting the opinion out. Thank you very much.

MR. FRIEDMAN: Thank you, Your Honor.

(Whereupon, at 3:50 p.m., the proceedings were concluded.)

[p. 57] CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

/s/ James M. Muscarella
James M. Muscarella, RPR
Official Court Reporter

The foregoing record of the proceedings upon the trial of the above cause is hereby approved, and directed to be filed.

/s/ _____
Hon. George Levin

(13)

No. 98-1161

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

v.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONERS

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42 pp

QUESTION PRESENTED

Did the Supreme Court of Pennsylvania, the court of last resort of the Commonwealth of Pennsylvania, improperly strike an ordinance of the City of Erie which fully comports with the principles articulated in *Barnes v. Glen Theatre, Inc.*, thereby willfully disregarding binding precedent in violation of the Supremacy Clause at Article VI, Clause 2 of the Constitution of the United States?

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OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of the Commonwealth of Pennsylvania and concurring opinion are reported at 553 Pa. 348, 719 A.2d 273 2 (1998) and are reproduced at Appendix F to the petition for writ of certiorari.

The opinions and orders of the Court of Common Pleas of Erie County, Pennsylvania and of the Commonwealth Court of Pennsylvania are reproduced at Appendices B through D to the petition for writ of certiorari. The order of the Supreme Court of Pennsylvania granting limited review of the decision of the Commonwealth Court is reproduced at Appendix E to the petition.

JURISDICTION

The Supreme Court of Pennsylvania, the highest court of the Commonwealth, rendered its opinion and order on October 21, 1998. A petition for writ of certiorari was timely filed and was granted on May 17, 1999.

Jurisdiction is vested in the United States Supreme Court by 28 U.S.C. § 1257(a) (1994), as the validity of a municipal enactment is questioned as repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, which provides that

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Supremacy Clause of the Constitution of the United States of America, which provides that

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

STATEMENT OF THE CASE

This action was initiated by Complaint in Equity and Petition for Preliminary Injunction before the Court of Common Pleas of Erie County, Pennsylvania, filed October 14, 1994. The complaint named as defendants the City of Erie, Pennsylvania, its mayor Joyce A. Savocchio, and five members then seated on the City Council. Plaintiff below Pap's A.M. identified itself as a Pennsylvania corporation maintaining a place of business within the City of Erie, and described its business as "an establishment which provides nude dancing." [Pet. App. A at 1a, 3a].

Pap's asked the court below to enjoin enforcement of City of Erie Ordinance 75-1994, to declare the ordinance

invalid and unenforceable, and to enjoin the City of Erie from enacting similar legislation in the future. In a second count Pap's sought damages, counsel fees and costs of litigation. [Pet. App. A at 4a-5a].

The challenged ordinance was enacted by a majority vote of City Council on September 28, 1994 and was signed into law by Mayor Savocchio on September 30, 1994. The ordinance repealed an 1866 version of Article 711 of the Codified Ordinances of the City of Erie, titled *Indecency and Immorality*, and replaced it with a new article titled *Public Indecency*.[1] The text of Ordinance 75-1994 was closely modeled on the text of the ordinance reviewed and upheld by this Honorable Court in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

Pap's complaint challenged the ordinance on federal and state constitutional grounds. Pap's averred that the ordinance violates the freedoms of speech and expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, § 7 of the

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[1] The new Article 711 provides that a person commits a summary offense by performing any of four enumerated acts knowingly and intentionally in a public place:

a. engaging in sexual intercourse
b. engaging in deviate sexual intercourse as defined by the Pennsylvania Crimes Code
c. appearing in a state of nudity
d. fondling his/her own genitals or the genitals of another person

"Nudity" and "public place" are defined terms. Children under ten years of age and women breastfeeding infants are excepted from the scope of the ordinance. [Ordinance 75-1994, appended to the Complaint, Pet. App. A at 8a-9a].

Constitution of the Commonwealth of Pennsylvania. The ordinance was also challenged as overbroad. [Pet. App. A at 3a].[2] The Court of Common Pleas denied Pap's petition for preliminary injunction by Order issued October 21, 1994. [Pet. App. B at 19a].

A permanent injunction was granted following a hearing on December 21, 1994. The trial court declared Ordinance 75-1994 unconstitutional and barred its enforcement. [Pet. App. C at 20a-40a].

The City took an appeal as of right to the Commonwealth Court of Pennsylvania, the appropriate intermediate appellate court. The City challenged the lower court's declaration of constitutional invalidity and challenged Pap's standing to bring a claim under the First Amendment.[3] Pap's cross-appealed seeking counsel fees which had been denied by the lower court.

The Commonwealth Court's opinion and order issued on March 27, 1996. That court analyzed the *Barnes* decision under the framework set forth in *Marks v. United States*, 430 U.S. 188 (1977), and concluded that Justice Souter's opinion articulates the holding of *Barnes*. *Pap's A.M. v. City of Erie*, 674 A.2d 338, 343 (Pa. Commw. 1996)

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[2] Pap's further averred that enforcement of the ordinance constitutes a taking; that the ordinance violates Pap's right to the equal protection of the laws; and that the ordinance is preempted by Pennsylvania obscenity law. [Pet. App. A at 3a-4a]. Those issues were not addressed by the Pennsylvania Supreme Court.

[3] The City also took issue with the lower court's failure to place a limiting construction on the ordinance and failure to rule on immunity issues.

[citations omitted]. The Commonwealth Court reasoned that an ordinance regulating speech will stand if it satisfies the test in *United States v. O'Brien*, 391 U.S. 367 (1968), and is designed to prevent secondary effects associated with adult entertainment. 674 A.2d at 343. The intermediate court held that the ordinance does not violate rights guaranteed by the First Amendment notwithstanding infrequent, incidental limits on some expression. *Id.* at 344. The Commonwealth Court further noted the obligation of a state court to construe a statute to avoid constitutional problems where possible. The court expressly limited the ordinance to ban public nudity and not expression. *Id.* at 346.

The Supreme Court of Pennsylvania granted review limited to two issues: whether Ordinance 75-1994 violates the rights to free speech and expression guaranteed by the Constitutions of the United States and of Pennsylvania, and whether the ordinance is fatally overbroad. *Pap's A.M. v. City of Erie*, 688 A.2d 168 (Pa. 1997). The court heard argument on September 16, 1997 and rendered its opinion on October 21, 1998.[4]

The Pennsylvania court acknowledged the majority ruling in *Barnes* extending the protection of the First Amendment to nude dancing. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276 (Pa. 1998). The court declined to find any further guidance in *Barnes*. *Id.* at 278.

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[4] At the time of argument the Pennsylvania court had only six justices seated. Madame Justice Newman did not participate in this decision. Of the five justices who decided the appeal, three justices joined in the opinion of the court. Two justices joined in a concurring opinion.

In its independent analysis of Ordinance 75-1994, the Pennsylvania court rejected the argument that the ordinance is content-neutral. Overlooking the limiting construction, the court analyzed the ordinance under strict scrutiny and found that it impermissibly burdens expression protected by the First Amendment. The Pennsylvania court struck the definition of nudity and the prohibition of public nudity from the ordinance. 719 A.2d at 279-281.[5]

SUMMARY OF ARGUMENT

The City petitioned for certiorari averring manifest reversible error. The Pennsylvania court, as a lower court bound by the decisions of the United States Supreme Court, is not empowered to decide a federal question in a manner contrary to a directly relevant decision of this Court. Even if the Pennsylvania court could not find a rule of law in the *Barnes* decision, it was bound by the result.

The First Amendment's protection is not limited to the spoken or written word. Expressive conduct has long been recognized as a means of communication. There has been a great deal of debate over whether totally nude, barroom-type "exotic" dance is expressive conduct or simply conduct. The controversy was settled by this Court in *Barnes*. The *Barnes* Court ruled that nude dancing is expressive conduct, such that restrictions on nude

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[5] The Pennsylvania court did not reach the overbreadth issue.

dancing must satisfy the requirements of the First Amendment. Despite differences in reasoning a majority of the Court voted to uphold Indiana's public indecency statute.

The Indiana statute reviewed in *Barnes* prohibited the same conduct as does Ordinance 75-1994. The Pennsylvania court found that Erie's ordinance is a content-based restriction targeting protected expression. From that faulty premise the Pennsylvania court went on to apply strict scrutiny and strike the portions of the ordinance prohibiting public nudity as violative of the First Amendment.

The court made no effort to distinguish the case before it from the case in *Barnes*. The three-member majority professed itself unable to glean a rule of law from the *Barnes* decision, and from there rejected both the reasoning and the result in *Barnes*.

Lower courts interpreting the *Barnes* decision have worked to reconcile the various opinions and state a rule of law. The precedential value of the reasoning in *Barnes* may be the subject of debate. However, there is no question as to its result. The Pennsylvania court has no power to interpret the Constitution of the United States in a fashion contrary to a directly relevant decision of the United States Supreme Court. The Pennsylvania court's decision must be reversed.

ARGUMENT

The government's power to restrain free speech is to be exercised sparingly and with the utmost discretion. In enacting its public indecency ordinance, the City of Erie honored that obligation. A governmental entity may sometimes burden speech or expression to advance a significant and legitimate state interest. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 786 (1984), citing *Schenck v. United States*, 249 U.S. 47 (1919). Erie's public indecency ordinance imposes a minimal burden on speech to advance significant and legitimate interests. The incidental impact on some expression does not violate the First Amendment.

In *Barnes*, Indiana's public indecency statute was challenged by the operators of two establishments which featured totally nude dance and by two of the dancers. The Court of Appeals in *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), outlined an already lengthy procedural history. The statute was overturned at the trial court level in the Indiana court system, but upheld by the Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (1979). Appeals to the United States Supreme Court from the *Baysinger* decision were dismissed for want of a substantial federal question.

The statute was then unsuccessfully challenged in the federal courts on an overbreadth theory. The Seventh Circuit in *Glen Theatre v. Pearson* held that the prior litigation compelled a finding that the statute as limited by the Indiana Supreme Court in *Baysinger* was not unconstitutionally overbroad. The circuit court left open the issue of whether the statute as applied violated rights guaranteed

to the plaintiffs by the First Amendment, and remanded to the District Court. 802 F.2d at 291.

The District Court concluded that the dancing presented was simply conduct and not protected by the First Amendment. The Seventh Circuit reversed, finding that the dance was expressive conduct and that the public indecency statute was impermissibly content-based, with the purpose of suppressing the message conveyed by the dance. The issue reached the United States Supreme Court in *Barnes v. Glen Theatre*.

The plurality opinion in *Barnes* noted the prior cases tentatively extending the protection of the First Amendment to nude dancing as expressive conduct. The *Barnes* Court took the next step and decided the issue in the affirmative. From there, the remaining analysis is familiar. The Justices deciding *Barnes* simply disagreed as to whether the Indiana statute needed to or could survive the *O'Brien* test.

I. THE CITY OF ERIE CORRECTLY RELIED ON THE *BARNES* DECISION.

The cases leading up to *Barnes* show a disinclination on the part of the Court to extend the protection of the First Amendment to all nude dance performed in any setting. Speech is evaluated both by content and context. The court looks both to the words and to the circumstances in which the words are used. *Schenck v. United States*. This Court's decisions in *California v. LaRue*, 409 U.S. 109 (1972), *Doran v. Salem Inn*, 422 U.S. 922 (1975), and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), acknowledged the possibility that some nude dance may

have sufficient communicative intent as to implicate the First Amendment. In *Doran v. Salem Inn* the Court noted the limited communicative value of the performances at issue. 422 U.S. at 932 (barroom-type nude dancing could be protected expression under some circumstances). A majority of the *Barnes* Court decided that nude dance is expressive conduct. As will be shown later, that decision necessarily compels regulations of nude dance to be examined under the test enunciated in *O'Brien*.

The City of Erie's Ordinance 75-1994 was drafted and adopted in reliance on the *Barnes* decision. The ordinance explicitly incorporates "the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre, Inc., et al.*" [Pet. App. A at 7a]. The ordinance prohibits the same conduct. It defines nudity in the same way. [*Id.* at 8a]. The Indiana court limited the reach of the Indiana statute by limiting the definition of public place. Erie's ordinance includes a fairly expansive definition so as to include a wide range of conduct. [*Id.* at 9a].

In response to constitutional concerns the Commonwealth Court subjected the ordinance to a limiting construction. As the ordinance reached the Pennsylvania Supreme Court, the prohibition of public nudity was enforceable in such contexts as could reasonably be expected to contribute to undesirable secondary effects. That limiting construction reflected a valid interpretation of the requirements of *Barnes*.

The Pennsylvania Supreme Court did not identify any feature of Erie's ordinance which distinguishes it from the Indiana statute in *Barnes*. It characterized the

case before it as "very similar" to the case in *Barnes*. 719 A.2d at 277. The Pennsylvania court decided that the sole controlling principle to be drawn from *Barnes* is that non-obscene nude dancing is properly considered expressive conduct. *Id.* at 276. On that basis the court opined that "no clear precedent arises out of *Barnes*" for the interpretation of Erie's ordinance. The Pennsylvania Supreme Court declined to follow any of the previous interpretations of the *Barnes* decision. Instead the court concluded that the plurality and concurring opinions in *Barnes* are irreconcilable and that the *Barnes* decision is not relevant precedent. *Id.* at 278.

A. The result in *Barnes* is binding on lower courts.

In constitutional matters, the lower courts are bound both by the reasoning and the result of cases decided by this Honorable Court. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., dissenting). The Third Circuit Court of Appeals' opinion in *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), stressed the importance of precedent in the legal system.

> Decisions of the Supreme Court regarding federal law and the Constitution are binding on the lower courts. There is no room in our system for departure from this principle, for if it were otherwise, the law of the land would quickly lose its coherence.

947 F.2d at 691.

It is undisputed that a state supreme court's interpretation of the state's constitution is dispositive. The

Pennsylvania court did not base its decision on the Pennsylvania constitution. Rather, the court decided that Erie's ordinance is invalid under the federal Constitution, disregarding the holding in *Barnes*. The Pennsylvania court is simply not permitted to make that determination.

The Supreme Court of the United States is the "final arbiter of whether the Federal Constitution necessitate[s] the invalidation of a state law." *New York v. Ferber*, 485 U.S. 747, 767 (1982). Erie's public indecency ordinance is concededly nearly identical to Indiana's statute. Because Indiana's statute was upheld by a majority of the Justices deciding the *Barnes* case, the result in *Barnes* is controlling precedent here. The Pennsylvania court's difficulty in fashioning a rule of law from the *Barnes* decision does not relieve it of its obligation to follow the result.

B. The opinions comprising the *Barnes* decision can be reduced to a controlling rationale.

Three distinct schools of thought are represented in the differing opinions in *Barnes*. There is disagreement at the threshold determination of whether nude dancing is speech in the form of expressive conduct or simply conduct. There is disagreement at the crucial determination of whether the Indiana public indecency statute prohibiting public nudity incidentally burdens expression or is intended to suppress expression. There is disagreement among the lower courts over the rule of law to be derived from *Barnes*.

The plurality and concurring opinions in *Barnes* rest on different reasoning. Lower courts have therefore turned to the mechanism for drawing a rule from the

opinion of a divided Court provided in *Marks v. United States*. The *Marks* rule instructs that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " 430 U.S. at 193, quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The objective of the *Marks* rule is to promote predictability in the law and provide guidance for lower courts. The rule should be formulated to produce a result with which a majority of the Justices deciding the previous case would agree, but can be drawn from the opinion of a single Justice. *Planned Parenthood v. Casey*, 947 F.2d at 693.

The Court of Appeals for the Third Circuit has written extensively on the analysis of plurality opinions. The circuit court went on in *Planned Parenthood* to stress the importance of that analysis, stating that a "binding opinion from a splintered decision is as authoritative for lower courts" as a unanimous opinion. 947 F.2d at 694. An erroneous analysis has the same effect, in the Third Circuit's view, as a rejection of a majority opinion of the Court. *Id.* The Pennsylvania court's erroneous analysis of the *Barnes* decision pointedly demonstrates the accuracy of the Third Circuit's opinion.

The differing opinions in *Barnes* must be examined in light of prior cases reaching the Supreme Court. The Court in *LaRue* acknowledged that the First Amendment might reach to protect nude public performances in some contexts, but that the police power was clearly sufficient

to bar the "bacchanalian revelries" there. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996) [citations omitted]. The decision in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), established that zoning ordinances may limit the location of adult entertainment establishments as a means of preserving surrounding neighborhoods. Justice Souter's concurrence in the *Barnes* case utilizes that established justification for regulations of adult entertainment.

The District Court for the Northern District of Ohio viewed the *Barnes* decision as a "true plurality," one where the plurality and concurring decisions turn on different reasoning. *Triplett Grille, Inc. v. City of Akron*, 816 F. Supp. 1249 (1993) (*"Triplett I"*). The *Triplett I* court determined that Justice Souter's concurrence, relying on a governmental interest already accepted in *Renton*, ruled on the narrowest grounds. The court further noted that the Eleventh Circuit's decision in *International Eateries, Inc. v. Broward County*, 941 F.2d 1157 (1991), decided shortly after *Barnes*, concluded that Justice Souter's concurrence states the rule of law in *Barnes*. 816 F. Supp. at 1254.

The *Triplett I* court rejected the reasoning of the plurality in *Barnes* as "dramatically expand[ing] the scope of the *O'Brien* test" by accepting morality as a sufficient justification for local legislation. 816 F. Supp. at 1254. The *Barnes* plurality opinion uses the phrases "morals and public order" and "order and morality." 501 U.S. at 568, 569. Those phrases can be read as a short-form reference to the states' general police power, described as "the authority to provide for the public health, safety, and

morals." *Id.* Contrary to the opinion of the court in *Triplett I*, it takes no dramatic expansion of the *O'Brien* test to accept the States' traditional police power as sufficient justification for an ordinance prohibiting public indecency.

The District Court found Akron's ordinance invalid because the record before it did not establish that the legislative intent of Akron's ordinance was to address secondary effects attributable to nude dancing establishments. 816 F. Supp. at 1249. The City of Akron took an appeal to the Sixth Circuit. The circuit court thoroughly examined the *Marks* rule and the opinions in *Barnes*. The court agreed that Justice Souter's concurrence resolved the issue on the narrowest grounds and therefore states the rule of law in *Barnes*. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 130 (1994) (*"Triplett II"*).[6]

The Sixth Circuit reasoned that the *Barnes* plurality opinion finds the statute sufficiently justified as an exercise of the state's police power. The police power is broad enough to encompass the prevention of undesirable secondary effects. Because the secondary effects rationale is a "coherent subset of the principles articulated in the plurality opinion," the plurality and Justice Souter share a "common underlying approach." Justice Souter's concurrence therefore decides the question on the narrowest grounds. 40 F.3d at 134. *See also, Farkas v. Miller*, 151 F.3d

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[6] The Sixth Circuit found the ordinance constitutional as applied to Triplett Grille. 40 F.3d at 135. As a federal court, the Sixth Circuit was not permitted to supply a limiting construction. The court therefore reluctantly affirmed the District Court's finding of overbreadth. *Id.* at 136.

900 (8th Cir. 1998) (plurality opinion broad enough to encompass secondary effects).

The opinion of the District Court for the Northern District of New York in *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (1997), traces the development of the First Amendment doctrine regarding nude dancing and sexually explicit expression, culminating in an analysis of *Barnes*. The District Court viewed the governmental interest in combating secondary effects as too far removed from the general police power to represent a narrow holding with which the plurality would necessarily agree. 949 F. Supp. at 995. For that reason, the court determined that the plurality opinion states the rule of law in *Barnes*. *Id.* at 998.

The Commonwealth Court of Pennsylvania revisited the nude dancing issue in 1998 in *Purple Orchid, Inc. v. Pennsylvania State Police*, 721 A.2d 84. The Commonwealth Court observed that most federal courts have upheld bans on nude dancing.[7] The court's survey of cases regulating adult establishments showed that most

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[7] The court cited *J & B Entertainment v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998); *Sammy's of Mobile v. City of Mobile*, 140 F.3d 1993 (11th Cir. 1998); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997); *Café 207 v. St. Johns County*, 989 F.2d 1136 (11th Cir. 1993); and *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991). 721 A.2d at 90 n.11. The Commonwealth Court further observed, not without rancor, that "after [the Supreme Court's decision in] *Pap*'s, the rule is that anyone can engage in nude dancing anywhere other than in licensed liquor establishments, unless the prohibition meets the strict scrutiny test." *Id.* at 92.

courts have relied on the plurality's reasoning in *Barnes* and a significant number on Justice Souter's. *Id.* at 90 n.11. Different choices by lower courts between the plurality's reasoning and Justice Souter's reasoning leave the state of the law somewhat unsettled and lacking uniformity. Erie's ordinance does not force a choice. It draws its justification from both views.

In a different case, the Third Circuit noted the difficulty in some instances in framing an appropriate rule. The circuit court concluded that the plurality and concurring opinions in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), share no common ground. Where no rule can fairly be stated that would encompass the views of a majority of the Court, there may be no rule of law to carry forward. *Rappa v. New Castle County*, 18 F.3d 1043 (1994).

The Pennsylvania court treated *Barnes* as an opinion from which no governing standard can be drawn. The majority opinion there misstates the *Marks* rule as requiring a majority of the Court to agree on a rule of law. The Third Circuit's formulation of the *Marks* rule is more accurate. The rule of law in a plurality opinion is the rule which necessarily produces a result agreeable to the majority of the Justices deciding the case. 947 F.2d at 693. The Sixth Circuit in *Triplett II* remarked that the *Marks* rule does not adequately address a case where no one opinion states a position supported by at least five Justices who concurred in the judgment. 40 F.3d at 134. Similarly, the Third Circuit observed that "there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered," but recognized that "it is the usual

practice when that is the determinative opinion." *Blum v. Witco Chemical Corp.*, 888 F.2d 975, 981 (1989).

The majority opinion of the Pennsylvania court "strain[ed] to find discord in *Barnes* where none exists." *Pap's A.M. v. City of Erie*, 719 A.2d at 282 (Castille, J., concurring in the result). While the Pennsylvania court is clearly in the minority of courts interpreting *Barnes*, its rejection of a governing standard is not ultimately at issue. The *Rappa* court did not refuse to recognize any precedential value in a case where no controlling rationale can be derived. To the contrary, the result in such a case is binding notwithstanding any differences in reasoning. The court in *Rappa* recognized that it was bound to either distinguish the ordinance then before it from the San Diego ordinance in *Metromedia*, or to follow the result in *Metromedia* and strike down the ordinance. 18 F.3d at 1060-61.

The approaches of the Justices deciding *Barnes* are not so radically different as to defy reduction to a controlling principle. The difficulty in cases following *Barnes* results from surplus language. The *Triplett Grille* formulation, requiring that a regulation of nude dancing survive the *O'Brien* test and be aimed at secondary effects, is too limiting. A regulation survives the *O'Brien* test because it is aimed at a governmental interest unrelated to the suppression of speech. The Court in *Barnes* advanced two legitimate governmental interests, both the traditional police power and the secondary effects rationale. The City of Erie's public indecency ordinance is sufficiently justified by either interest and encompasses both.

C. The secondary effects rationale sufficiently justifies Erie's public indecency ordinance.

This Court has previously noted the difficulty in drawing a principled distinction between traditional and controversial means of expression. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Courts interpreting *Barnes* have attempted to provide a means for making a principled distinction.

The secondary effects of adult motion picture theatres were described in *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), as deterioration of the surrounding neighborhood and increased crime. 427 U.S. at 71 n.4 (plurality opinion). In *American Mini-Theatres* the City of Detroit's "Anti-Skid Row Ordinance" was challenged as vague, as a prior restraint on communication and on an equal protection theory. Owners of adult motion picture theatres complained that the ordinance placed restrictions on their establishments solely on the basis of the films' content. The plurality in *American Mini-Theatres* concluded that the city's interest in preserving the character of its neighborhoods provided a sufficient justification for the classification. 427 U.S. at 71.

Justice Powell concurred, suggesting that the *O'Brien* test provided the appropriate means of analysis. 427 U.S. at 79. Because the governmental interest in the stability of its residential and commercial areas sufficiently justified the incidental encroachment upon protected expression, Justice Powell voted to uphold the ordinance. *Id.* at 84.

A similar ordinance was upheld in *City of Renton v. Playtime Theatres*. The Renton zoning ordinance, like Detroit's, required a minimum distance of one thousand

feet between any adult motion picture theater and residential zones, churches, parks, and schools. The *Renton* Court explicitly recognized the governmental interest in preserving the quality of urban life as not only important and substantial, but vital. *Id.* at 50.

The Eleventh Circuit Court of Appeals handed down its decision in *International Eateries* in 1991, not long after the *Barnes* decision. *International Eateries* involved a challenge to a Broward County zoning ordinance regulating the location of "adult nightclubs." The parties stipulated that International Eateries' business featured non-obscene nude dancing and was thus within the class of uses subject to the ordinance. 941 F.2d at 1158.

The Eleventh Circuit began its analysis with an examination of the status of nude dancing under the First Amendment. The court noted previous decisions which had assumed without deciding that non-obscene nude dancing is protected expression and cited previous decisions of lower federal courts which applied the secondary effects rationale to the regulation of nude dancing. 941 F.2d at 1159. The court then turned to the *Barnes* decision. Following a thoughtful discussion the Eleventh Circuit concluded that the *Barnes* decision did not displace the secondary effects requirement. Because Justice Souter's concurrence in *Barnes* relied on the secondary effects rationale, the circuit court concluded that a statute regulating nude dancing is still required to rely on secondary effects. *Id.* at 1161.

The Eleventh Circuit's analysis of *Barnes* was not dispositive in its case. Nonetheless, it is instructive. The circuit court characterized the ordinance in *Barnes* as a

general prohibition of public nudity, making no distinction between expressive and non-expressive conduct. 941 F.2d at 1161. Unlike the Broward County zoning ordinance regulating only designated uses, Erie's public indecency ordinance prohibits a broad range of conduct in public places.

Critics of the secondary effects doctrine have suggested that use of secondary effects as a justification for limiting speech be limited to circumstances where the secondary effects are not amenable to direct regulation. *Boos v. Barry*, 485 U.S. 312, 338 (1988) (Brennan, J., dissenting). Erie's public indecency ordinance falls within that suggested limitation. The same devaluation of the surrounding areas attributed to adult motion picture theatres can be attributed to establishments featuring live nude entertainment. The government's vital interest in protecting and preserving the desirability of its residential neighborhoods and business districts is a sufficient justification for the ordinance's incidental encroachment on protected expression.

D. The states' traditional police power sufficiently justifies Erie's public indecency ordinance.

The plurality opinion in *Barnes* straightforwardly faces an issue central to the debate over governmental regulation of public nudity. The opponents of regulation contend that any restriction of public nudity is of necessity content-based and invoke the specter of official censorship of expression. The plurality opinion recognizes that not all public nudity is expressive conduct. That public nudity which is expressive is well protected by the

O'Brien test. The third step of the *O'Brien* analysis requires that the governmental interest furthered by the regulation be unrelated to the suppression of expression. The fourth step requires that the restriction on expression be both incidental, or subordinate, to the primary legitimate purpose, and no greater than essential. 391 U.S. at 377.

The ordinance in *Barnes* and Erie's ordinance are legitimate exercises of the states' authority to legislate for the promotion of the public health, safety and morals. The plurality opinion dispatches the general arguments against "legislating morality" with reason, observing that the law is essentially based on morality. 501 U.S. at 569 (plurality opinion), quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986).

The individual's right of free expression cannot be given free reign at all times, but must sometimes be subordinated to the general welfare. The minimal subordination engendered by Erie's public indecency ordinance is well within the limits tolerated by the First Amendment.

II. THE DECISION IN *BARNES* PROVIDES THE PROPER FRAMEWORK FOR THE EVALUATION OF RESTRICTIONS OF NUDE DANCING.

A. Because nude dance is expressive conduct, regulations of nude dance are reviewed under intermediate scrutiny.

The Court in *Barnes* ended the controversy over First Amendment protection of nude dancing. By deciding that nude dancing is expressive conduct, the Court also

decided the method for analysis of restrictions on nude dancing.

A message may be delivered by conduct that is meant to be communicative and would, within the totality of the circumstances, reasonably be understood by the viewer to be communicative. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) [citations omitted]. The Court in *Clark* utilized a burden-shifting analysis. The burden is on the proponent of the conduct to show sufficient communicative elements to bring it within the ambit of the First Amendment. The burden then shifts to the government to justify the burden on expression. 468 U.S. 288, 293 at n.5.

Viewing the conduct in the context in which it took place, the court first must determine whether the conduct has sufficient communicative elements to implicate the First Amendment. That determination requires a two-part inquiry. The court determines whether there was an intent to convey a particularized message, and whether there was a great likelihood that those present would understand the message. The intent to convey a message can be inferred from the circumstances. *Spence v. Washington*, 418 U.S. 405 (1974).

Expressive conduct is thus broken down into two elements: the message and the means of expression. The message may not be suppressed. The means of expression, in a proper case, may be regulated. The Fourth Circuit's articulation of the *O'Brien* inquiry clearly places the focus on the means of expression. That court posed the issue as "the degree to which the First Amendment protects normally regulated conduct which has been

turned from its ordinary course to be performed for a communicative purpose." The court there reasoned that the use of conduct as a means of expression will not invalidate an otherwise constitutional restriction on the conduct. *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140, 144 (1991).

If the First Amendment is implicated, the court then decides whether the regulation under review furthers a governmental interest that is not related to the suppression of free expression. If it does, then the standard of *United States v. O'Brien* applies. *Texas v. Johnson*, 491 U.S. 397 (1989).

The expressive conduct doctrine developed through a line of cases involving political speech. *See generally Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (black armbands worn by students as a political protest); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in by black students protesting segregation); *Stromberg v. California*, 283 U.S. 359 (1931) (flying red flag); *Cohen v. California*, 403 U.S. 15 (1971) (political slogan on jacket). In such instances the communicative intent is evident. The actor seeks to persuade others to accept his or her point of view on an issue, and perhaps to take action in support of that viewpoint. The hard cases arise where the communicative intent of the conduct is not evident.

The plaintiff in *O'Brien* argued that any conduct intended to be communicative should be constitutionally protected. The *O'Brien* Court disagreed but did not limit the types of conduct which can be communicative. 391 U.S. at 376. The *Barnes* Court decided that nude dancing

is sufficiently communicative as to fall within the periphery of First Amendment protection. By so deciding, the Court also decided that the intermediate scrutiny standard of *O'Brien* will be used in examining restrictions on nude dancing.

B. The intermediate scrutiny standard is well established.

The *O'Brien* analysis of a regulation restricting expressive conduct is "in the last analysis little, if any, different from the standard applied to time, place and manner restrictions." *Clark*, 468 U.S. at 298. Time, place and manner restrictions are valid if they are justified without reference to content, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. 468 U.S. at 293 [citations omitted].

Similarly, under the *O'Brien* test a regulation is sufficiently justified if it is within the constitutional power of the government and furthers an important or substantial governmental interest. The governmental interest must be unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedoms no greater than is essential to further the interest. 391 U.S. at 377. Both tests recognize that the First Amendment tolerates a balancing of interests. The third prong of the *O'Brien* analysis places the government's interests first. The interests of the speaker and audience can be burdened where the burden is incidental to a legitimate interest. The interest in free expression is protected by the

requirement that the restriction be no more extensive than necessary.

In *Clark*, demonstrators wished to camp in a national park to express a message of support for homeless persons. Their request was denied because camping in the park was normally restricted to designated camping areas. While not discounting the communicative value of the symbolic campout, the majority in *Clark* found that the communicative value was outweighed by the legitimate governmental interest in maintaining the condition of the park property. 468 U.S. at 298.

The plaintiff in *O'Brien* argued that the act of burning his draft card symbolized his opposition to war. Assuming without deciding that the conduct had sufficient communicative elemer[illegible]o trigger First Amendment scrutiny, the Court observe[illegible]at a sufficiently important governmental interest can justify a regulation of conduct which incidentally limits speech. 391 U.S. at 376.

The Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), made it abundantly clear that the fourth prong of *O'Brien* is not functionally equivalent to the least-restrictive-means prong of strict scrutiny analysis. The requirement is satisfied if the regulation is not substantially broader than necessary to achieve the legitimate interest. 491 U.S. at 798.[8] A least-restrictive-alternative requirement engrafted into mid-level scrutiny blurs the

[8] The *Albertini* test referenced in *Ward* seems to require only that the regulation be effective. The *Ward* Court used "direct and effective." 491 U.S. at 800.

distinction between mid-level and strict scrutiny and is therefore not used. *Id.* at n.6.

A similar distinction was made by the Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). Like the *O'Brien* test, the test for restrictions on commercial speech is closely analogous to the general time, place and manner formulation.[9] Where commercial speech is regulated, the government bears the burden of establishing a reasonable fit between the legitimate interest and the prohibition. 492 U.S. at 480. The Court in *Fox* declined to import the least-restrictive-means standard into intermediate scrutiny. *Id.* at 478.

The *Barnes* decision thus utilized a well-established analytical framework to determine whether Indiana's statute is a permissible limitation on expressive conduct. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993

[9] Speech is commercial speech if it proposes a commercial transaction. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) states the threshold determination for commercial speech. To come within the protection of the First Amendment, commercial speech must (a) concern a lawful activity and (b) not be misleading. If that threshold is passed, then the government must show (a) that the asserted interest is substantial; (b) that the regulation at issue directly advances that interest; and (c) that the regulation is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. The last step was refined in *Fox* to the "reasonable fit" standard. 492 U.S. at 480.

The viability of the *Central Hudson* test was recently reaffirmed in *Greater New Orleans Broadcasting Ass'n., Inc. v. United States*, ___ U.S. ___, 119 S. Ct. 1923 (1999).

(1998), the Eleventh Circuit upheld Mobile's prohibition of nude dancing only in establishments with liquor licenses. The court determined that Mobile's ordinance is valid as restricting "only the place or manner of nude dancing without regulating any particular message it might convey." The Eleventh Circuit then concluded that Mobile's ordinance withstands intermediate scrutiny, which it described as the "*Barnes-O'Brien* test." 140 F.3d at 996.

It is clear that the courts have developed a unified approach to the analysis of content-neutral restrictions on speech and expression.[10] Restrictions on speech are considered content-neutral if they are justified without reference to the content of the speech. *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Erie's public indecency ordinance is a legitimate exercise of the traditional police power, intended to promote the public health and order and prevent the deterioration of neighborhoods. The ordinance is justified without reference to a message communicated through nude erotic dance. It should therefore be analyzed under intermediate scrutiny. The Pennsylvania court instead looked beyond the plain language of the ordinance to find an intent to suppress expression, and subjected the ordinance to strict scrutiny. 719 A.2d at 279.

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[10] But see, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999) (observing that the choice of test may occasionally determine outcome).

III. ERIE'S PUBLIC INDECENCY ORDINANCE WITHSTANDS INTERMEDIATE SCRUTINY.

Ordinance 75-1994 generally prohibits public nudity within the City of Erie. This general prohibition has the incidental effect of burdening expressive nudity along with non-expressive nudity. The preamble to the ordinance references an increase in the number of establishments featuring live nude entertainment. Live nude entertainment is considered undesirable for many reasons. A municipality only remains viable when it offers its residents the type of neighborhoods and living conditions they desire. Citizens of Erie, not unlike any other citizens, want safe and attractive neighborhoods and pleasant shopping areas. They are concerned about the public health consequences of unsafe sexual practices and unsanitary conditions which are commonplace in adult entertainment establishments. Many of them do find sexually oriented entertainment offensive and contrary to their moral and religious values. All of these reasons motivated the City Council to enact the ordinance and the mayor to sign it into law. For all of these reasons, the ordinance should be upheld.

The Pennsylvania court acknowledged a legitimate motivation for the enactment of Ordinance 75-1994. In addition, however, the court found an "unmentioned purpose" to suppress free expression. The court focused on the dissent in *Barnes*, which posited that the same dance performed by a fully nude dancer has a different impact on a spectator than when performed by a clothed or partially clothed dancer. 719 A.2d at 279, citing *Barnes* at 592 (White, J., dissenting).

The *Barnes* dissent equates impact on a viewer with communication of a message, and concludes that this difference in impact is the basis for the prohibition of fully nude erotic dance. The Pennsylvania court found the stated purpose of Erie's ordinance overshadowed by this perceived unstated purpose. The Pennsylvania court therefore found Erie's ordinance content-based, aimed at a distinctive expressive component present in fully nude dance but absent where a brief costume is worn. 719 A.2d at 279.

The Court in *O'Brien* stated that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." 391 U.S. at 383. The Court there cautioned against inquiry into legislative motive as "a hazardous matter." *Id.* A regulation is considered content-neutral if it serves purposes unrelated to the suppression of expression, even if it affects some speakers or messages but not others. *Ward*, 491 U.S. at 791. The *Barnes* dissent and the Pennsylvania court overlook the incidental nature of the burden placed on expression by an ordinance prohibiting public indecency and instead would permit no legislative consideration of the content of the burdened expression.

In *City of Renton*, the District Court and Court of Appeals had split over the extent to which the enacting body may consider content. The District Court used a "predominate concern" standard. The Court of Appeals concluded, however, that if content was a motivating factor in the enactment of the ordinance, the ordinance is impermissibly content-based. The *Renton* Court upheld the District Court, stating that a predominate intent to

regulate the effects on the surrounding community provides a substantial justification for the ordinance. 475 U.S. at 47.

The *Renton* Court looked to the terms of the ordinance and not to the motives of individual legislators. 475 U.S. at 48, quoting *O'Brien*. The Pennsylvania court did not distinguish between the legislative intent of the ordinance and any personal reasons motivating a legislator's support for the ordinance. It is not necessary for an ordinance regulating nude dancing to be justified entirely without reference to the content of the expression. It is only necessary that the ordinance be constitutional on its face. *O'Brien*, 391 U.S. at 384.

An ordinance restricting nude dancing reached the Sixth Circuit again in *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (1997). The reach of Chattanooga's ordinance was limited to adult-oriented entertainment, citing the risks to the public health and the promotion of prostitution and crime as the justification for the ordinance. The ordinance banned not only nudity but contact between performers and audience and required a buffer zone between the performance area and the audience. The Sixth Circuit followed its prior decision in *Triplett Grille* finding Justice Souter's concurrence to be the rule of *Barnes* but sought to limit *Barnes* to its facts. The circuit court read that opinion to leave open the possibility that not all nude dance is expressive conduct. 107 F.3d at 409.

The Sixth Circuit found the ordinance's seeming discrimination among types of nude performance probative of content-neutrality. The court there reasoned that since all expressive nudity was not banned, it was reasonable

to infer that the target of the ordinance was not expressive nudity but was indeed the secondary effects of adult establishments. 107 F.2d at 410-11.

The Fourth Circuit in *D.G. Restaurant Corporation v. City of Myrtle Beach* upheld an ordinance containing a statement of purpose similar to that of Erie's ordinance. The Fourth Circuit noted that testimony before the District Court centered on concern for the quality of life of Myrtle Beach's residents and the incompatibility of adult entertainment with the image Myrtle Beach wished to promote as a tourism destination. Because the plain language of the Myrtle Beach ordinance was sufficient to establish the legislative intent, the Fourth Circuit ordered dissolution of the injunction barring its enforcement. 953 F.2d at 147.

The plain language of Erie's ordinance evidences substantial regard for the necessary balancing of interests. The preamble states that restrictions on speech and expression are to be "carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare." [Pet. App. A at 7a]. The statement of purpose is explicit. The ordinance was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

[*Id.*]. Each and every element required to satisfy intermediate scrutiny is present within the language of the ordinance. There is no need to look beyond the ordinance itself to interpret its provisions. As applied to the act of dancing fully nude in public, the ordinance is within the constitutional power of the government as a valid exercise of the police power. It furthers important and substantial interests which are unrelated to the suppression of free expression. To the extent that expression is affected, the ordinance is no more restrictive than necessary to further the interest.

Therefore, Erie's ordinance passes the *O'Brien* test. Non-expressive public nudity is prohibited throughout the City of Erie. Expressive public nudity is incidentally burdened where the burden is justified by legitimate governmental interests. Those interests are clearly identified within the language of the ordinance.

The Pennsylvania court's finding of illicit legislative intent runs directly counter to the teaching of *O'Brien*. Legislators' statements are used only to interpret ambiguous enactments. The *O'Brien* Court would not

> void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the

> same or another legislator made a "wiser" speech about it.

391 U.S. at 384.

The Borough of Nescopeck, located in Luzerne County, Pennsylvania, enacted a public indecency ordinance on May 11, 1998. Nescopeck's ordinance was concededly identical to the ordinance in *Barnes*. The District Court for the Middle District of Pennsylvania was thus constrained to distinguish its case from Erie's case before the Pennsylvania Supreme Court. The court noted that Erie's ordinance differed from the *Barnes* ordinance merely by the inclusion of language seemingly targeting nude dancing, and observed that that language formed an insubstantial basis for the Pennsylvania court's characterization of Erie's ordinance as impermissibly content-based. *D'Angio v. Borough of Nescopeck*, 34 F. Supp. 2d 256 (M.D. Pa. 1999).

CONCLUSION

In *Barnes v. Glen Theatre*, a majority of this Honorable Court decided that nude dance performances fall within the First Amendment's guarantee of freedom of speech and expression. That guarantee tolerates a balancing of the interests of speaker and audience and legitimate governmental interests. Both the traditional police power and a municipality's vital interest in preserving attractive and desirable neighborhoods provide sufficient justification for a minimal burden on the expressive element of fully-nude dance.

Despite differences in reasoning, five members of the *Barnes* Court voted to uphold Indiana's public indecency statute. The Pennsylvania Supreme Court nonetheless struck the portions of the City of Erie's public indecency ordinance which prohibited the same conduct as Indiana's statute.

Justice Castille's concurring opinion in *Pap's A.M.* properly looks for the common ground in the *Barnes* decision. He therefore disagrees with the Pennsylvania court's majority, which found no controlling principle in *Barnes*. The majority in *Barnes* found Indiana's statute content-neutral. The Pennsylvania court, in the view of the concurring Justices, defied binding precedent by applying strict scrutiny to Erie's ordinance. 719 A.2d at 283 (Castille, J., concurring).

The First Amendment's guarantee of free speech and expression does not permit the government to regulate what individuals may say. It does tolerate limits on the means by which ideas are communicated. Erie's public indecency ordinance does not aim to suppress expression. The minimal encroachment on expression is subordinate to the ordinance's primary, legitimate purpose.

Therefore, the decision of the Pennsylvania court should be reversed.

Respectfully submitted,

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No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE, *et al.*,

Petitioners,

vs.

PAP'S A.M., t/d/b/a "KANDYLAND,"

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Pennsylvania

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QUESTION PRESENTED

1. Does the Supremacy Clause of the United States Constitution require a reversal of the judgment of the Pennsylvania Supreme Court under the compulsion of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)?

OPTIONAL QUESTION PRESENTED*

2. Does the First Amendment compel affirmance of the judgment of the Pennsylvania Supreme Court?

   a. Is Erie's anti-nudity law facially invalid to the extent it applies to expressive performances before willing adult audiences because it imposes a direct, total and significant prohibition on the content of expression which applies at all times, in all places, and regardless of the manner in which such performances may be presented?

   b. Is Erie's anti-nudity law (to the extent it applies to expressive performances before willing adult audiences) an invalid content-based restraint upon expression as *construed and applied* by municipal officials?

---

* The sole question presented in the certiorari petition is based exclusively upon the Supremacy Clause and not upon the First Amendment. Respondent does not wish to inject any additional questions presented into this case, nor does it request the Court to do so. However, if this Court should choose to address the merits of the First Amendment issues potentially in this case *sua sponte*, Respondent submits that resolution of the following additional First Amendment issues would independently support the judgment of the Pennsylvania Supreme Court.

QUESTION PRESENTED – Continued

c. Does the ordinance violate the First Amendment by failing to require proof that a given performance violates the three part test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973)?

d. Is the Erie Ordinance facially invalid (to the extent it applies to expressive performances before willing audiences) due to the impact of its substantial overbreadth on parties not before the Court?

e. As construed and applied by Erie officials, does the Erie Ordinance violate the First Amendment by establishing a discretionary system of prior restraint whereby municipal officials act as a local censorship board applying unwritten, subjective, and arbitrary standards to determine which nude performances are constitutionally protected and which are not?

f. Even if the ordinance is found to have only a *de minimis* or incidental impact on the content of expression, does the ordinance nonetheless fail under the intermediate scrutiny of this Court's *O'Brien* test?

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STATEMENT OF THE CASE

On September 28, 1994 the Erie City Council enacted Ordinance No. 75-1994 by a four-two vote. (Cert. App. 6a-10a.)[1] The entire meeting leading to adoption of the ordinance was recorded and made part of the trial record. Each voting council member stated the reasons for his or her vote. (Jt. App. 36-48.) All members voting in favor of the ordinance indicated that they intended the ordinance to target live nude dancing, to which they were opposed. *Id.* The preamble to the ordinance candidly states that it was enacted to limit nude live entertainment. (Cert. App. 42a.)

On October 14, 1994, Respondent filed a complaint with the Court of Common Pleas of Erie County seeking injunctive and declaratory relief. (Cert. App. 1a-10a.) Respondent challenged the ordinance, *inter alia*, as being a violation of freedom of expression as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution, both as applied to Respondent and in terms of its substantial overbreadth as applied to others not before the court.

On December 21, 1994 a hearing was held before the Court of Common Pleas of Erie County, Pennsylvania. Counsel for two Erie theatrical companies, The Erie Playhouse and the Roadhouse Theatre, spoke in support of Respondent's position. He advised the court that those theaters had presented productions containing "nudity and strong adult content" (Jt. App. 87), the Playhouse having performed "productions like *Hair* and *Bent*" and the Roadhouse having recently performed '*Equus*'. (Jt. App. 87.) He further stated:

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[1] The Council meeting transcript of September 28, 1994 appears in the joint appendix. (Jt. App. 36-48). The transcript lacks the subsequent vote count. The vote count, as certified by the City of Erie Clerk, is attached as Appendix A of this brief. Pursuant to F.R.E. 201(b)(2) the vote count of the City Council is judicially noticeable because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, under Rule 201(f), judicial notice may be taken at any stage of a proceeding.

"The Playhouse should not be forced into the position of defending any production that it presents. They should not be forced to adopt contingency plans in the event that a government official tries to close a play or arrest a member of a cast or director. That act alone stops the production, damages the organization and forces the expenditure of scarce funds to defend against the government action. As long as these possibilities exist, they chill my clients' freedom of speech and expression. The presentation and subjective interpretation of a play is a guaranteed constitutional right.

"The possible enforcement of this ordinance gives the government the power to affect the essence of our constitutional liberties, to free speech expression and presentation of thoughts and ideas. Any infringement on that right by the government, however slight or however well intentioned, cannot be tolerated by a free society." (Jt. App. 87-88)

The City's attorney advised the court that it was not the City's intention "to infringe on constitutional rights to the extent Playhouse is doing productions . . . which content or which conduct can be construed as a protected performance. Certainly, we don't think this ordinance applies, it's been our . . . position that it doesn't apply." (Jt. App. 88-89.) He stated that "the arts" are a "higher protected form of expression." (Jt. App. 107.) The City then stipulated that

> "the play, '*Equus*' features frontal nudity and was performed for several weeks in October/November 1994 at the Roadhouse Theatre in downtown Erie with no efforts to enforce the nudity prohibition which became effective during the run of the play." (Jt. App. 84)

* * *

On June 3, 1999, following this Court's grant of certiorari, Respondent filed a motion to dismiss as moot based upon its counsel's just having learned that the premises in

question had ceased operating as a nude dancing establishment and that Respondent had no remaining interest in either those premises or any other nude dancing establishment in Erie or elsewhere. Following full briefing by both sides, this Court denied the motion to dismiss on June 24, 1999.

SUMMARY OF ARGUMENT

The sole question presented herein is whether the judgment of the Pennsylvania Supreme Court violates the Supremacy Clause because the court did not find controlling this Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). This question does not seek review of the underlying merits of the First Amendment issues, absent a Supremacy Clause violation.

Although the Pennsylvania Supreme Court's opinion may have failed to articulate why *Barnes* did not require a reversal, its *judgment* nonetheless complies with the Supremacy Clause because there are numerous factual and legal distinctions between this case and *Barnes*. For example, the statute in *Barnes* was truly content-neutral, having its roots in the Nineteenth Century as a broad public nudity prohibition. In contrast, the preamble of Erie's ordinance expressly states the City's intent specifically to limit live nude entertainment and has been construed and applied exclusively to prohibit nudity in the context of expressive performances. Because Justice Scalia's concurrence in *Barnes* was based entirely on the content-*neutrality* of the Indiana statute, the content-*based* nature of Erie's ordinance removes it from any controlling impact under Justice Scalia's opinion.

Likewise, Justice Souter, whose vote was also critical in *Barnes*, expressly stated that *Barnes* presented no substantial overbreadth challenge and that his opinion might be different in a case presenting such a challenge. This case presents such a challenge.

Accordingly, for both of these reasons, this case is sufficiently different from *Barnes* that the Supremacy Clause did not compel the Pennsylvania Supreme Court to apply *Barnes* as controlling.

Should this Court agree that the Supremacy Clause did not compel the Pennsylvania Supreme Court to follow *Barnes*, this Court's own rules and precedent place the underlying merits of the constitutionality of Erie's ordinance beyond the scope of the grant of certiorari. However, should this Court nonetheless choose to address such issues – a course which Respondent does not request – it should affirm the Pennsylvania Supreme Court under any of a variety of possible First Amendment rationales hereinafter discussed.

ARGUMENT

I

WHILE THE PENNSYLVANIA SUPREME COURT'S REASONING MAY CONFLICT WITH THE SUPREMACY CLAUSE, ITS *JUDGMENT* CLEARLY DOES NOT

The first paragraph of the City's certiorari petition expressly requests that this Court issue a writ of certiorari "to review the *judgment* of the Supreme Court of Pennsylvania." The City's sole question presented asks this Court to examine the Pennsylvania Supreme Court's judgment exclusively under the Supremacy Clause; it does not ask this Court to examine whether the Pennsylvania Supreme Court's judgment, absent a Supremacy Clause violation, comports with the First Amendment.

Respondent acknowledges that in failing to distinguish this case from *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the court below may have improperly analyzed the potential Supremacy Clause impact of *Barnes*; however its *judgment* did not violate the Supremacy Clause. This is because there were numerous distinctions between this case and *Barnes* not discussed by the Pennsylvania Supreme Court, but which nonetheless appear in the record, freeing that court to strike the City's ordinance without violating the Supremacy Clause.

A. The Doctrine of *Marks v. United States* is Inapplicable Here.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court articulated how to discern its holding where no single opinion obtains a majority vote, but where there is an opinion concurring in the judgment on sufficiently narrow grounds that it would necessarily be endorsed by at least five Justices. While the *Marks* rule is useful in determining the holding of this Court in a great many cases, there are a variety of other cases where it is not. This is such a case.

Specifically, as Erie has correctly noted, there is significant confusion among the lower courts regarding whether any opinion rendered in *Barnes* necessarily constitutes the "holding" of the Court:

> "Different choices by lower courts between the plurality's reasoning and Justice Souter's reasoning leave the state of the law somewhat unsettled and lacking uniformity." Petitioner's Brief at 17.
>
> * * *
>
> "[M]ost courts have relied on the plurality's reasoning in *Barnes* and a significant number on Justice Souter's." Petitioner's Brief at 16-17.

One might also argue that Justice Scalia's concurrence in *Barnes* is the narrowest opinion, as he articulated a narrow position suggesting that such a law might not be upheld if it were not enforced evenly against *all* forms of public nudity. Conceivably, an anti-nudity law aimed primarily at expression could meet the tests of the plurality and Justice Souter's concurrence, but fall under the narrower test articulated (or at least strongly suggested) by Justice Scalia.

Respondent agrees with Erie that the correct statement of law is that articulated in *Rappa v. New Castle County*, 18 F.3d 1043, 1057-1060 (3rd Cir. 1994), where the court acknowledged that there are cases where no rule can fairly be stated that would encompass the views of a majority of the Court, making the *Marks* rule inapplicable. Of course, that conclusion does not end the inquiry.

As *Rappa* indicated, a lower court is not free to disregard a *judgment* of this Court involving a seemingly identical and indistinguishable factual or legal issue. *Id.* at 1061. As noted by Erie, the *Rappa* court was faced with the question of whether it was bound to follow any of the splintered opinions in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), by virtue of the *Marks* rule. It concluded that it was not, but that it was bound to follow this Court's *judgment* in *Metromedia* unless it presented one or more grounds of potentially meaningful distinction between the two cases. *Id.* That approach seems applicable here.

B. Although The Pennsylvania Supreme Court Did Not Utilize a *Rappa*-type Analysis, its Judgment Should Nonetheless be Affirmed.

Given the apparent similarities between the *Barnes* statute and the Erie ordinance, the Pennsylvania Supreme Court should have distinguished this case from *Barnes* before reaching its own conclusions under the First Amendment. Because it failed to articulate such distinctions fully,[2] its *opinion* did not give sufficient deference to *Barnes*.

However, the record before the Pennsylvania Supreme Court provided *substantial* bases for distinguishing this case from *Barnes* and, as a result, its *judgment* is consistent with the Supremacy Clause and should not be reversed. It is, of course, a separate matter whether its opinion correctly applies the First Amendment, but that issue is not raised in either the Questions Presented or the Petition for Writ of Certiorari.

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[2] The Pennsylvania Supreme Court *did* articulate one important distinction between this case and *Barnes*; it expressly noted that the ordinance, on its face, stated that it was adopted "for the purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279. If this, rather than Justice White's dissent in *Barnes*, were the basis for its conclusion that the ordinance was content-based and that strict scrutiny applied, then its *reasoning*, as well as its *judgment*, would be consistent with the Supremacy Clause.

C. There Are Numerous Factual and Legal Distinctions Between This Case and *Barnes* Compelling the Conclusion That the *Judgment* Below Did Not Violate the Supremacy Clause.

The Supremacy Clause does not control here unless both the facts and legal issues presented in this case are substantially indistinguishable from those in *Barnes*, at least to the extent that such issues were treated as significant in any of the three separate opinions supporting the judgment in *Barnes*. The analysis below will readily demonstrate that *Barnes* does not preordain the constitutionality of the present ordinance.

1. *Barnes* did not involve an anti-nudity restriction aimed primarily, if not exclusively, at expressive performances.

Justice Scalia's concurring opinion in *Barnes* (which supplied an indispensable fifth vote in support of the judgment) did not state how he would rule if there were substantial evidence in the record that an anti-nudity law was targeted specifically at expressive activity, but it strongly suggested that he *would* find such a law unconstitutional. Indeed, the entire thrust of Justice Scalia's opinion in *Barnes* was his observation that Indiana's anti-nudity statute was a general ban against public nudity in any form and under any circumstances. To support his contention that the law was not particularly aimed at expression, he offered numerous published state court opinions to show that it was *frequently* enforced in non-expressive contexts. 501 U.S. at 574.

It therefore stands to reason that the judgment of the court below did not violate the Supremacy Clause because the record here, unlike that in *Barnes*, is replete with indicia of a content-based purpose and a content-based enforcement pattern. As shown *infra*, this evidence ranged from the facial language of the ordinance, to legislative statements by all of

the council members who voted for the ordinance, to statements by counsel representing the City in all the court proceedings to date, to the actual enforcement_pattern of the ordinance.

a. The ordinance, on its face, articulates a purpose aimed directly, if not exclusively, at expressive activities.

As the Pennsylvania Supreme Court noted, the preamble to the ordinance candidly acknowledges that it was adopted "for the purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279. (Jt. App. 42a.)

While the motivation for the *Barnes* statute was a condemnation of the general concept of public nudity (a concept having nothing to do with entertainment *per se*), Erie's ordinance, on its face, indicates that its purpose was content-based and aimed exclusively at expressive activities.

b. All of the council members who voted for this ordinance affirmatively stated their intent to use it to eliminate nude dancing in clubs and *not* to use it as a general anti-public nudity law.

As noted *supra*, the Erie City Council enacted its anti-nudity ordinance by a 4 – 2 vote. Immediately prior to the vote, all four members who voted in favor of the ordinance[3] made explanatory statements in the record about their imminent votes, indicating either that their primary target was expressive businesses or that they did not intend the ordinance to be enforced as a general and broad proscription of public nudity.[4]

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[3] I.e., Councilmembers Thompson, Brabender, Bagnoni and Maras.

[4] Councilmember Thompson's remarks appear at Jt. App. 38-41. He first clarified that the ordinance was not intended to be used to prohibit public nudity occurring in either "theatre or art" (Jt. App. 39), and then stated: "we're not prohibiting nudity, we're prohibiting nudity when it's used in a lewd and immoral fashion." *Id.* Continuing, he states: "it is live pornography. It is not acceptable in this city." *Id.* at 40.

Councilmember Brabender's remarks appear at Jt. App. 41-42. To emphasize his point that the ordinance was not aimed at public nudity per se, he mentioned with approval a previous practice in an Erie high school where male students would always participate in swimming classes in the nude. *Id.* at 41. In contrast, to show where the intended enforcement of the ordinance would be placed, he condemned nudity occurring in clubs serving alcohol. *Id.* at 42.

Councilmember Bagnoni's remarks appear at Jt. App. 42-44. He made very clear that the focus of the ordinance was on nude dancing establishments, stating that "the girls can wear thongs or a g-string and little pasties that are smaller than a diamond." *Id.* at 43.

Councilmember Maras' remarks appear at Jt. App. 46-48. His sole focus was on the impact of the ordinance on exotic dancing establishments.

Finally, the primary intent to use this ordinance against nude dancing establishments was shown most clearly by Councilmember Brzezinski who, in voting *against* the ordinance, stated: "[W]e're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which – or three, all three, will be shut down in one form or another." Jt. App. at 45.

Based on the foregoing, the legislative record provides additional clarification that the primary purpose of this ordinance was to use it in an expressive context.

c. The City's attorneys have repeatedly stated that they would not apply this ordinance to all public nudity, but would only apply it to businesses such as Respondent's.

Erie's counsel have uniformly asserted below that the ordinance's intended enforcement target is primarily, if not exclusively, a particular type of expressive activity. For example, the following colloquy occurred at the interim injunction hearing of October 19, 1994 between Judge Levin of the Court of Common Pleas, and Mr. Karle, counsel for the City:

"THE COURT: . . . what effect would this ordinance have on theater – theater productions such as Equus, Hair, O Calcutta? Under your ordinance would these things be prevented, Mr. Karle?

"MR. KARLE: No, they wouldn't, your Honor.

"THE COURT: Why not?

"MR. KARLE: To the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression, they would not be." Jt. App. 53.

Similarly, in the Pennsylvania Supreme Court, the City expressly asserted the intended "non-applicability of the ordinance to plays, ballets or other performances expressing messages beyond mere commercial eroticism." *See* page 1 of City's Brief For Appellees filed in the Pennsylvania Supreme Court. Having made such a statement, the City cannot now assert that either the purpose or the intended enforcement of this ordinance is content-neutral.

Again, the foregoing discussion does not resolve the ultimate First Amendment question of whether an ordinance so aimed is constitutionally sustainable; it only answers the question raised in the certiorari petition, whether there is a sufficient distinction between the present case and *Barnes* such that the Pennsylvania Supreme Court's decision did not violate the Supremacy Clause.

d. Pennsylvania's state indecency statute already prohibited most forms of non-expressive public nudity; the only additional conduct proscribed by the ordinance was expressive nudity.

In sharp contrast to the state ban on public nudity in *Barnes* (where Indiana legitimately argued that the statute served a content-neutral purpose of prohibiting all public nudity), Erie's ordinance was adopted in the face of a preexisting state statute which *already* prohibited public indecency (defined to mean any type of exposure of one's genitals

to the general unconsenting public). *See* Title 18 Pa. Cons. Stat. Ann. § 3127 which, when this ordinance was enacted, stated:

> "A person commits a misdemeanor of the second degree if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm."[5]

Given the existence of this preexisting statutory scheme, virtually the only "real life" circumstances where the City's anti-nudity ordinance would provide any significant additional coverage would be expressive performances before willing adult audiences. Again, this provides additional support for the conclusion that this is a content-based ordinance.

e. The City allowed 'Equus' to go unprosecuted just two months after passing this ordinance.

The record clearly establishes that the City has *already* employed content-based discretion in determining whether to enforce this ordinance. Specifically, the City stipulated that it permitted a run of the play 'Equus' to go unprosecuted after the ordinance was in effect (Jt. App. 84), and the City's counsel made clear that this was deliberate city policy. (Jt. App. 53.) The City has repeatedly acknowledged that the sole reason it tolerated public nudity in 'Equus' was its belief that 'Equus' was constitutionally protected expression. This is a paradigm of content-based enforcement under an overbroad law.

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[5] After the enactment of the ordinance at bar, this statute was amended slightly in March of 1995 to clarify that it applied regardless of the sex of the potential offender and to create a heightened offense for exposure to a person under 16 years of age.

f. Unlike the Indiana statute in *Barnes*, this ordinance additionally reveals a speech-directed purpose by its unique prohibition of *simulated* nudity.

Further proof that this ordinance, unlike the statute in *Barnes*, had a primarily speech-directed purpose, is its novel prohibition of *simulated* nudity. Specifically, it prohibits performances by persons who wear: (1) any "costume or covering which gives the appearance of or simulates," *inter alia*, the "natal cleft;" or (2) any cover over the female breast which "simulates and gives the realistic appearance of nipples and/or areola." Cert. Petition, 12a-13a. Body stockings, for example, simulate the "natal cleft" and are therefore prohibited by the ordinance.

The obvious and exclusive purpose of this ban on *simulated* nudity is to prohibit the appearance of nudity solely in the context of expressive performances. Whether simulated nudity is more common in "legitimate" theater[6] or in so-called "barroom" dancing contexts, either way, such simulations occur almost uniquely in the context of *expressive performances*, again demonstrating that a speech-directed purpose underlies this ordinance.

g. Conclusion.

Because Justice Scalia carefully distinguished *Barnes* from a case like this one where either the enforcement or enactment of a restriction on nudity was focused primarily on expressive activities, *Barnes* does not control under the Supremacy Clause.

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[6] Such apparel is used frequently in the mainstream arts, including numerous ballets and opera, at least to the extent such performances do not *in fact* involve actual nudity. For example, in the 1986 production of Salome at the Los Angeles Opera company, Salome's famous dance of the Seven Veils was performed *au naturel* by the internationally acclaimed soprano Maria Ewing (consistent with the requirements of Strauss' original libretto). Moreover, as shown by Respondent's supporting amici, actual nudity is also not uncommon in modern dance.

2. *Barnes* did not address a facial challenge to an anti-nudity statute based upon its substantial overbreadth.

As Justice Souter made clear in his concurring opinion in *Barnes*:

> "[T]here is no overbreadth challenge before us [nor] are . . . [we] called upon to decide whether the application of the statute would be valid in other contexts. It is enough, then, to say that the secondary effects rationale on which I rely here *would be open to question* if the state were to seek to enforce the statute by barring expressive nudity in classes of productions [such as] . . . 'Hair' or 'Equus'." 501 U.S. at 585, n.2. (Emphasis added.)

Erie's ordinance, on its face, prohibits all nudity in productions such as 'Hair' or 'Equus' (as well as a wide variety of other live productions – *see, e.g.*, amicus brief filed by the Thomas Jefferson Center). The record dramatically demonstrates the chilling effect which this ordinance has on such productions notwithstanding the City's discretionary non-enforcement of the ordinance against *one* of these named productions.[7]

Based on this demonstrated chilling effect and the incredibly broad facial language of the ordinance, Respondent has consistently asserted that the present ordinance is substantially overbroad and therefore may not be enforced against anyone, regardless of whether a narrower ordinance could properly prohibit its own performances.

Because Justice Souter (whose vote was critical to the judgment in *Barnes*) expressly stated that his own rationale

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[7] At the trial court hearing on permanent injunction and declaratory judgment on December 21, 1994, counsel for two of the City's "legitimate" theaters, the Erie Playhouse and the Roadhouse, described for the court the impact the ordinance was having on such theaters. These remarks appear at Jt.App. 86-89 and give a classic "flesh and blood" [*New York v. Ferber*, 458 U.S. 747, 768 (1982)] example of the real-life chilling effect which inheres in the overbreadth of this ordinance.

"would be open to question" in a case presenting a substantial overbreadth challenge of this type, the judgment of the Pennsylvania Supreme Court could not violate the Supremacy Clause because such a challenge was never considered in *Barnes*.

Again, this is not to say how Justice Souter or any other member of this Court might decide the First Amendment merits of a substantial overbreadth challenge. Rather, the sole question raised by Erie is whether the Supremacy Clause mandates a reversal of the judgment of the Pennsylvania Supreme Court for its failure to follow *Barnes*. Clearly, it does not.

3. *Barnes* did not involve evidence of a discriminatory content-based enforcement pattern the operation and effect of which is a *de facto* standardless prior restraint.

Yet another important distinction between this case and *Barnes* is that even though the ordinance *facially* bans all forms of public nudity, the facts show a discriminatory enforcement pattern and a clearly expressed intent to apply this ordinance in a content-based manner under which City enforcement officials act as a *de facto* censorship board, allowing the exhibition of those nude performances which they subjectively believe to be "constitutionally protected" while threatening full enforcement of the law against any which they, pursuant to unwritten, unreviewable and wholly discretionary criteria, deem to be "unprotected." It is not at all clear that such a scheme would have been upheld under the "public morals" rationale offered by the opinion of the Chief Justice speaking for a three Justice plurality in *Barnes*.

Specifically, the *Barnes* plurality opinion, while reaffirming that nude "barroom" dancing is constitutionally protected speech (as did eight members of this Court), nonetheless upheld an outright ban on that speech based upon the Indiana Legislature's presumed content-neutral intention to protect public morals by banning *all* public nudity.

For example, after noting that "[t]he history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition" (501 U.S. at 568), the plurality noted that "the public indecency statute furthers a substantial government interest in protecting order and morality" (*id.* at 569), and concluded that this "interest is unrelated to the suppression of free expression." *Id.* Here, in contrast, as City officials have construed and applied it, the ordinance is very much related to the suppression of expression. Both the enacting City Council and the City's lawyers have repeatedly clarified that the City intends to make its own determination of which nude performances are "constitutionally protected" and to enforce the ordinance only against those performances which *it* finds lacking in sufficient value. This is the essence of a content-based restraint.

Because the plurality opinion did not address an anti-nudity law which, on its face, banned *all* public nudity, but, as construed and applied, was used as a tool for local censorship, it is not at all clear that each of the Justices signing the plurality opinion in *Barnes* would necessarily consider this the same case such that the rule of *Barnes* would control under the Supremacy Clause.

II

SHOULD THIS COURT REACH THE MERITS OF THE FIRST AMENDMENT ISSUES IN THIS CASE *SUA SPONTE*, THE JUDGMENT OF THE PENNSYLVANIA SUPREME COURT SHOULD NONETHELESS BE AFFIRMED

A. Respondent Does Not Seek Review Of The First Amendment Issues But Has Briefed Those Issues For This Court Should It Consider Them *Sua Sponte*.

The sole question presented in Erie's certiorari petition is whether the judgment below violated the Supremacy Clause by assertedly being inconsistent with *Barnes*. Respondent

agrees that this is the only issue properly before the Court and believes that it should prevail on that point.[8]

Nonetheless, aware that several of Erie's amici have urged this Court to reach the underlying First Amendment issues, and fearful that it might be deprived of any meaningful input should this Court choose that course, Respondent requests that *if* this Court, against Respondent's wishes, decides to adjudicate the constitutionality of Erie's ordinance, *sua sponte*, under the First Amendment, it consider all of the First Amendment arguments below. This Court has held that a respondent may raise issues in this Court even where not raised below, and even where not set out as questions presented in the Brief in Opposition.[9]

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[8] Even if this Court found a Supremacy Clause violation and were to vacate and remand to require the lower court to articulate why *Barnes* is distinguishable, Respondent believes it would prevail on such a remand.

[9] In *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), the sole question presented concerned whether the judgment below correctly concluded that 28 U.S.C. § 2252 was constitutional. After narrowing § 2252 (and on that basis finding it constitutional), this Court noted that the respondents also wanted the lower court's judgment sustained on the alternative ground that a *different* federal statute (28 U.S.C. § 2256) was unconstitutional (even though there had been no mention of that statute in the Questions Presented of *either* party). The Court held:

> "These claims were not encompassed in the question on which this Court granted certiorari, but a prevailing party, without cross-petitioning, is 'entitled under our precedents to urge any grounds which would lend support to the judgment below.' " *Id.* at 78.

This Court then reached and rejected this alternative and newly raised ground. Although not spelled out in the opinion, the issue of the constitutionality of § 2256 was *also* not raised as a question presented in the *Respondent's* Brief in Opposition. (True copies of the Questions Presented from both the certiorari petition and the Brief in Opposition in *X-Citement Video* are attached hereto in Appendix B to this Brief.)

B. Erie's Ban On Public Nudity Is Facially Invalid To The Extent It Applies To Any Type Of Non-obscene Expressive Performances Before Willing Adult Audiences, Because It Is An Outright And Significant *Prohibition*, Rather Than A Mere *Regulation*, of A Particular Type of Expression At All Times, At All Places, and In Whatever Manner, Throughout An Entire City.

As set forth in Point I, the Erie ordinance, although facially content neutral, is clearly content based as construed and applied by City officials. Nonetheless, even if it had been enacted as a content-neutral general prohibition of public nudity, because its *effect* is a total and significant prohibition on the *content* of expression, it should be upheld only if it survives strict judicial scrutiny. For this reason, it should not be reviewed under the intermediate scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968).

Concurring with statements in numerous prior decisions of this Court,[10] eight members of this Court decisively held in *Barnes* that nude dancing, *including* even nude "barroom"[11] dancing, is protected by the First Amendment.[12] However, a

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[10] E.g, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *California v. LaRue*, 409 U.S. 109, 118 (1972) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

[11] The term "barroom dancing" is a partial misnomer here as the ordinance prohibits nude dancing regardless of the presence of alcohol.

[12] Although some Justices stated their belief that such dancing was at the outermost limit of First Amendment protection, at least eight Justices agreed such activity *was* protected by the First Amendment. *See*, e.g., 501 U.S. at 581 (concurring opinion of J. Souter); 501 U.S. at 566 (plurality opinion); and the four dissenters (*id.* at 587, *et seq.*). Indeed, Erie so concedes. *See*, e.g., Brief For Petitioner at 6-7 and 22-23. Of course, if such a performance were "obscene," no members of this Court would find it protected.

significant minority of this Court[13] analyzed the Indiana statute under the test of *United States v. O'Brien*, a test originally applied only to "symbolic expression" and subsequently found applicable "where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases."[14] The Chief Justice's plurality opinion suggests that the rationale for applying *O'Brien* was his perception that "the requirement that the dancers don pasties and g-strings does not deprive the dance of whatever erotic message it conveys." 501 U.S. at 571. Likewise, Justice Souter's opinion, while expressly concurring that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection (501 U.S. at 581), nonetheless analyzed the Indiana statute under the *O'Brien* test, although without expressly articulating why it was applicable. Presumably, Justice Souter perceived the requirement to "don pasties and g-strings" as a *de minimis* and incidental burden on expression rather than a significant restriction of content.

While neither the plurality opinion nor Justice Souter's opinion presented a detailed explanation of why the *O'Brien* test was the appropriate method of analysis, *O'Brien* was in fact an inappropriate test, inconsistent with substantial precedent of this Court, and, more importantly, with underlying fundamental First Amendment principles.

The problem with applying *O'Brien* to a prohibition of performance nudity is that the *O'Brien* test was never intended to analyze total *prohibitions* of expression; its appropriate use was, as this Court noted in *Schad*, "where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases." 452 U.S. at 69, n.7. On its face, Erie's ordinance bans *all* nude expressive performances, regardless of the time, place or manner of the performance. Since this Court nearly unanimously ruled that

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[13] I.e., Justices Rehnquist, Kennedy, O'Connor and Souter.

[14] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 69, n.7 (1981).

even nude "barroom" dancing is constitutionally protected expression, a complete *prohibition* of such expression (as distinct from a mere restriction or regulation of such expression), is the type of *direct* restraint on speech that has always been evaluated exclusively under a test of strict scrutiny.

O'Brien's chief flaw as a tool for analyzing such restrictions is that, contrary to certain equivocal suggestions appearing in three prior cases,[15] it is, on closer examination, *not* the equivalent of this Court's time, place and manner test, because the latter test contains one very important safeguard that is missing from the *O'Brien* test. Specifically, the third part of the time, place and manner test rejects even content-*neutral* restrictions on expression if they fail to allow "ample alternative channels"[16] for the regulated expression, i.e., the ability to convey the exact desired expression at some time, in some place, or in some manner.

Because a total prohibition of constitutionally protected nude dancing does not leave any alternative forum where such expression may occur, such a prohibition must fail under the time, place and manner test, regardless of whether it might otherwise survive scrutiny under *O'Brien* alone. The reason *O'Brien* does not have a requirement similar to the time, place and manner test's requirement of requiring "ample alternative channels of communication" is because, by its very design, the *O'Brien* test was never intended to apply in situations where ample alternatives for protected expression were foreclosed. In other words, as stated in *Schad*, *O'Brien* only applies in situations where a content-neutral statute only affects speech "incidentally or in a small number of cases."

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[15] *See*, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 566 (plurality opinion).

[16] *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

Yet, a total prohibition on constitutionally protected nude dancing is much more than an "incidental" restriction because it prohibits such expression in every single case where it might occur. It is simply a *total prohibition*.

Neither can there be any doubt that a total ban on nudity in expressive performances *significantly* alters the content of expression. As demonstrated in many of the amicus briefs supporting Respondent, nudity is a significant communicative element in a wide variety of expressive performances, whether in opera, ballet, "legitimate" theater, or the context of a theater or nightclub which primarily features such performances. Indeed, in the context of the very type of performances presented in Respondent's establishment, the progression of a striptease dance to the ultimate point of nudity was a key part of the communication, and was certainly so perceived by the audience (and, obviously, by the Erie City Council). Any assertion that the nudity is merely "incidental" to the communication would be utterly without factual or logical support.

The notion that restrictions on the amount or nature of a performer's clothing are not inherently restrictions of content is easily refuted. In several Islamic countries women are not permitted to expose even their *faces* or *ankles* in public. To do so is considered highly immoral. Suppose, for example, that a predominantly Moslem community in the United States enacted a law prohibiting the public exposure of women's faces or ankles. The rationale there, as here, would be the local governing body's perception of morality. As applied to directly prohibit constitutionally protected expression, such a law would be invalid in the absence of proof that it was necessary for the promotion of a compelling government interest. The same problem affects anti-nudity ordinances applied in the context of prohibiting nude performances before willing adult audiences. Anti-nudity laws such as Erie's are constitutionally indistinguishable from the hypothetical laws of such Moslem lawmakers who truly believe that a moral offense is committed when a woman exposes her

face or ankles in public. The First Amendment must require greater protection than uncritical deference to legislative determinations of morality where protected expression is at issue.

While a prohibition of the exposure of a woman's face or ankles in public is probably at the "outermost limits" of modesty-type legislation, the principle derived from the foregoing analysis is equally applicable to *any* governmental restriction on the clothing required of a performer. In other times in our own country, it was considered immoral for women to expose even their shins or shoulders in public. While rational basis review might apply to the analysis of such restrictions where First Amendment rights are not affected,[17] this Court has always imposed strict scrutiny where government relies on "morality" or "value" justifications as the sole bases for restrictions on communicative expression.[18]

To take another example, suppose that, as a revenue raising measure, a city required all performers to pay a

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[17] *See*, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy prohibition held not to implicate fundamental rights and upheld under rational basis test); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (rational basis test used to uphold ban on "obscene" expression, held to be outside protection of the First Amendment). While the plurality opinion in *Barnes* cited these two cases in support of its assertion that restrictions on expression may be based exclusively on a governmental interest in protecting morality, Justice Scalia pointed out that this Court refused to find the existence of fundamental rights in either case and consequently the laws were simply upheld under a mere test of rational basis scrutiny. 501 U.S. at 580.

[18] For example, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) this Court held:

> "The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *Id.* at 382 (citations omitted).

license fee and, in order to facilitate enforcement, required all performers to wear a 4"x3" laminated copy of their municipal license on their right shoulder. This content-neutral restriction would be a direct and significant interference with the content of expression because it would interfere with the very message being communicated. If the requirement were enforced against the Metropolitan Opera company performing the opera Turandot, the incongruity of a Princess Turandot compelled to wear an identification card would surely not escape the attention of the First Amendment.

The point is simply that *any* interference with the costuming choices of an expressive performer (performing before a willing audience) is, by definition, an interference with the *content* of expression, even if the purposes for the restriction are themselves content-neutral. It forcibly substitutes government's choice of the content of expression for that of the playwright, choreographer, director or performer, and as such, it is anathema to our Constitution. Accordingly, it is critical that such restrictions be analyzed either under a direct compelling interest test or, alternatively, under the test for time, place and manner restrictions with the safeguard of ensuring ample alternative channels for the communication. In the context of the hypothetical requirement to wear a "performer permit" or of the requirement not to expose the female face in a performance, it is clear that there are *no* ample alternative channels for such communications, because the desired First Amendment performance (i.e., one where the performer's face is visible or where the performer's appearance is not altered by a governmentally-required permit) is prohibited at all times, in all places, and in all contexts. It is the same with the City's outright prohibition of all performance nudity in Erie.

Finally, this Court has already articulated a two-part test for determining whether a law is a significant restraint on the *content* of expression (again, regardless of whether the *purposes* for the law are content-neutral). In *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), this Court determined that

conduct is expressive when the following two factors are present: (1) intent to convey a particularized message; and (2) a substantial likelihood that the message will be understood by those receiving it. Nude performances easily meet these two tests. Whatever else one may say about it, the actual nudity at the conclusion of a striptease dance communicates an image or message that is simply not the same if the striptease does not proceed to its ultimate conclusion.[19] Likewise, it is quite certain that any audience would fully understand and appreciate the difference. No nightclub featuring erotic dancers with g-strings and pasties could stay in business long if its otherwise indistinguishable competitors offered performances which culminated in nudity. As shown in the study attached to the amicus brief of Bill Conte, *et al.* (at App. 15, *et seq.*), significantly different messages are in fact communicated to audiences depending on whether dancers performing virtually identical dances dance either nude or wearing the equivalent of pasties and g-strings.

In short, whether measured from the test of *Spence*, or simply from the common sense notion that restrictions on the costuming choices of expressive performers and/or directors are *inherently* restrictions of content, it is clear that Erie's ordinance is a *direct* prohibition, rather than an incidental or insignificant one, and it leaves *no* alternatives (ample or otherwise) for the same communication. As such, *O'Brien* is inapplicable and the ordinance likewise cannot be sustained as a time, place and manner restriction. Accordingly, Erie's ordinance may only survive, if at all, pursuant to application of a compelling interest test.

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[19] As stated by Justice Souter in his concurrence in *Barnes*:

"[W]hen nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are integrated into the dance and its expressive function." 501 U.S. at 581.

C. As Construed And Applied By City Officials, Erie's Ban On Public Nudity Is Also Invalid Because It Was Enacted For Demonstrably Content-Based Purposes.

The prior point assumed, *arguendo*, the content-neutrality of the legislative purposes underlying this ordinance, but asserted its invalidity because it is a direct restraint on the content of expression and is neither incidental, nor a legitimate time, place and manner restriction.

In contrast, this point will demonstrate that even the asserted "justifications" for the ordinance are not content-neutral. Accordingly, for this reason as well, the Erie ordinance is subject to strict scrutiny and not reviewable under the *O'Brien* test. As this Court stated in *Texas v. Johnson*, 491 U.S. 397, 403 (1989):

> "If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of non-communicative conduct controls. . . . If it is, then we are outside of *O'Brien's* test."

The opinions of both Justice Scalia and the plurality in *Barnes* made clear that truly content-neutral purposes motivated Indiana to enact its broad ban on public nudity in the Nineteenth Century. However, that is certainly not the case here. Erie's ordinance is not supported by a general content-neutral rejection of the concept of public nudity[20] but, instead, was enacted for the clear and conceded purpose of prohibiting public nudity only in the context of particular types of expressive performances disfavored by four Erie Council members. Although the ordinance appears *facially* content-neutral (at least in its prohibitory sections as distinct from the statements of purpose in its "Whereas" clauses), both the members of the City Council who voted for it and the City's attorneys have consistently indicated their intention to

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[20] Indeed, the City allowed public nudity in performances of Equus at the Roadhouse Theater (Jt. App. 84 and 53) and did so deliberately (Jt. App. 53).

exempt from enforcement those performances which *they* deem to be of greater value, i.e., to be sufficiently significant to merit constitutional protection. This record reflects only that they deemed 'Equus' to merit constitutional protection but not the erotic dancing performances at Respondent's former nightclub. It is not clear how the City would apply the ordinance to a wide variety of other constitutionally protected conduct involving performance nudity (numerous examples of which are provided in the supporting amicus brief of the Thomas Jefferson Center).

Where a governmental entity enacts a restriction on expression for an assertedly content-neutral purpose, this Court has required that the content-neutral justifications for the ordinance affirmatively appear in the legislative record *prior* to enactment. *See*, e.g., *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180, 195, 211 (1997)[21]. This

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[21] In *Turner II*, this Court applied "intermediate First Amendment scrutiny under *United States v. O'Brien*" (520 U.S. at 185) in analyzing the asserted content-neutral justifications offered by the Government in support of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act. The parties challenging that act had asserted that "the must-carry law is not necessary to assure the economic viability of the broadcast system as a whole." 520 U.S. at 211. This Court rejected that contention, stating that it was irrelevant whether Congress was in fact *correct* in determining the necessity for the Act, so long as it *in fact* considered substantial evidence from which it could reasonably conclude the need for the Act:

> "This assertion misapprehends the relevant inquiry. The question is not whether Congress, as an objective matter, was correct to determine must-carry is necessary. . . . Rather, the question is whether the legislative conclusion was [1] reasonable and [2] supported by *substantial evidence in the record before Congress*." 520 U.S. at 211 (emphasis added.)

While both *Turner Broadcasting System v. F.C.C. (Turner I)*, 512 U.S. 622 (1994) and *Turner Broadcasting System v. F.C.C. (Turner II)*, 520 U.S. 180 (1997), clarified that post-hoc evidence is permissible for determining whether a content-neutral law is "narrowly tailored," the cases stand for the proposition that before one even examines a law for narrow tailoring, the

requirement of pre-enactment consideration of an ostensibly content-neutral justification by the legislative body, provides at least a *minimal* degree of protection against blatantly content-based restraints masquerading under the pretext of content-neutrality. As Justice O'Connor noted in her concurring opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), this Court must continually be on the alert for the *pretextual* assertion of content-neutral secondary effects where the real motivation is one of censoring that which is inconsistent with the moral values of the enacting body. Indeed, as Justice O'Connor stated subsequently in her concurrence in *City of Ladue, supra*: "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others." 512 U.S. at 60.

Here, Erie has done precisely what Justice O'Connor warned against; it has established a facially content-neutral blanket restriction, but then arbitrarily decides which nude performances it wishes to prohibit.[22] In short, it is valuing "some forms of speech over others." *Id.* at 60.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), this Court made the following analogous point:

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initial determination of whether the law is in fact *content-neutral* must be established by virtue of evidence *in fact* considered by the enacting body.

This is not inconsistent with this Court's statement in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) where it ruled that cities need not re-invent the wheel by producing their own evidence, but must, nonetheless, rely upon evidence which "is reasonably believed to be relevant to the problem that the City addresses." *Id.* at 51-52. *Cf. United States v. Virginia*, 518 U.S. 515 (1996) where, in another case involving an "intermediate" level of scrutiny (i.e., less demanding than strict scrutiny but more rigorous than rational basis scrutiny) this Court, in the context of an asserted gender-based equal protection violation, stated:

> "The justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation." *Id.* at 533.

[22] This is in sharp contrast to the content-neutral enforcement policy found controlling by Justice Scalia in *Barnes*. 501 U.S. at 574.

> "Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384 (emphasis in original).

Similarly here, assuming that the City could permissibly enact a broad content-neutral ban on public nudity, absent a compelling interest it could not make the further content discrimination of arbitrarily proscribing only certain nude performances but not others. Because such a restriction raises the likelihood of content-based discrimination, any asserted justifications for such a content-based restriction must be carefully examined under strict scrutiny.

For all the reasons above, the ordinance is not only impermissible because it is a direct, significant, and total prohibition of the content of constitutionally protected expression, but also because the record demonstrates no adequate content-neutral justification. While the presence of such evidence in the record would not necessarily guarantee that the ordinance had in fact been enacted for truly content-neutral purposes, the absence of such evidence virtually assures that it was not.

D. The City Has No Compelling Interest Which Would Justify A Direct Content-Based Restraint Upon Expression.

No member of this Court has *ever* suggested that prohibiting nudity in performances before adult audiences is necessary for furtherance of a *compelling* governmental purpose, nor is any such purpose identified in the legislative record.

E. To The Extent It Applies To Expressive Performances Involving Nudity Before Willing Adult Audiences, Erie's Public Nudity Ban Also Violates The First Amendment For Failure To Require Proof Of Obscenity Under The Test Provided In *Miller v. California*, 413 U.S. 15 (1973).

Precisely because of the inherent dangers to expression where local legislators are allowed to control the content of

expression, a majority of this Court, after struggling for decades, agreed on a test for obscenity. *Miller v. California*, 413 U.S. 15 (1973). In defining "obscenity," this test provides significant safeguards against unrestrained government censorship of protected expression. For example, it ensures that before any particular performance is found to be a criminal or punishable act, it must not only lack serious literary, artistic, political or scientific value, but it must also exceed contemporary community standards, a test which applies on a work-by-work basis. The yardstick of contemporary community standards in the obscenity test is critical if sufficient "breathing space" for protected expression is to survive in this country because it ensures that individual legislators cannot condemn that which the community generally tolerates.[23]

Pennsylvania has recognized the appropriateness of using the *Miller* test as the basis for determining whether a live performance violates commonly accepted community values. Pennsylvania's state obscenity statute, 18 Pa. Cons. Stat. Ann. § 5903 (a)(5) (as amended, 1990) proscribes nudity in performances, but *only* when such performances are in fact "obscene." This is consistent with Justice Souter's observation in *New York v. Ferber*, 458 U.S. 747, 778 (1982), that:

> "[t]he question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."

Neither the Constitution, nor contemporary community standards, are blind to the significant distinction between the nudity of a "flasher" on a public street and the nudity of a dancer or actor performing before a willing adult audience.

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[23] Indeed, the genesis of the concept of "contemporary community standards" derives from Justice Harlan's opinion for the Court in *Smith v. California*, 361 U.S. 147, 171 (1959), where he stated: "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." This is a critical and fundamental constitutional principle which this Court has observed for nearly half a century, and which is in direct variance to the anti-nudity ordinance at issue here.

Application of this Court's obscenity test will ensure that only those live performances which in fact exceed community standards will be prohibited.

F. To The Extent It Applies To All Types Of Expressive Performances Before Adult Audiences, The Erie Ordinance Is Also Facially Invalid Due To Its Substantial Overbreadth On Parties Not Before The Court.

Notwithstanding the assurances of Erie officials that they will exert great discretion in the enforcement of their anti-nudity ordinance, it facially bans *all* nude performances in Erie and, because of the lack of any precise guidelines to restrict the discretion of City officials, has an enormous chilling effect on parties not before the Court.

The record reflects that when the ordinance was passed, there were three nightclubs in Erie presenting nude dancing,[24] and also two "legitimate" theaters (the Erie Playhouse and the Roadhouse Theater) which desired to stage dramatic performances which included nudity. At the request of the trial judge, an attorney representing these two local theaters described the ordinance's chilling effect on these theaters. Jt. App. 86-89. After noting that the Erie Playhouse had "performed productions like 'Hair' and 'Bent' " and that the Roadhouse Theater had "recently performed 'Equus'," he observed the following:

> "Each [of the performances noted above] has nudity and strong adult content. The decision regarding nudity in each performance was up to the director's and actor's interpretation. The decision was not affected by a government imposed standard that is subject to varying interpretations by government officials who do not share the same opinion regarding the artistic, literary, social content or importance of the production as the members of the public, the cast and the production staff. Should an

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[24] *See* Jt. App. 45, remarks of Council member Brzezinski.

important production be stopped or not presented because one or two members of a government organization with the power to enforce the laws believes it lacks serious artistic, literary or social content?" *Id.* at 87.

Continuing, he noted:

"The Playhouse should not be forced into the position of defending any production that it presents. They should not be forced to adopt contingency plans in the event that a government official tries to close a play or arrest a member of a cast or director. That act alone stops the production, damages the organization and forces the expenditure of scarce funds to defend against the government action. As long as these possibilities exist, they chill my clients' freedom of speech and expression. The presentation and subjective interpretation of a play is a guaranteed constitutional right." Jt. App. at 87-88.

The chilling effect of an ordinance such as this one is indeed severe because much of "legitimate" theater operates on a very thin margin and cannot afford to risk undertaking productions which the City might close. Because there are no precise guidelines governing the discretion of City officials, the Erie Playhouse and the Roadhouse Theater must err on the side of caution, as it is impossible to know how the City will apply the ordinance in any particular circumstance.

Moreover, as indicated in the amicus briefs filed by the Thomas Jefferson Center and Bill Conte, *et al.*, the scope of "traditional" arts performances which include nudity is indeed quite substantial. Neither are the most notable examples limited to older productions such as 'Hair,' 'Equus,' 'O Calcutta,' or the 'Ballet Africains'. As indicated in the record, the Erie Playhouse had previously performed 'Bent,' and one of the most popular productions on Broadway in the past year has been 'The Blue Room,' made nationally famous by Nicole Kidman's nude performance. Beyond this, nudity is *extremely* common in lesser-known theatrical productions and contemporary ballet. Moreover, as noted previously herein, actual

nudity occurs occasionally even in opera. *See* n.6, *supra*. Unquestionably, the ordinance prohibits considerable serious theatrical, dance, and musical expression.

Respondent may assert the rights of others not before the Court in bringing a facial challenge to an overly broad law. *See*, e.g., *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 956-958 (1984); *Thornhill v. State of Alabama*, 310 U.S. 88, 97 (1940); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-380 (1977); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-635 (1980); and *American Booksellers Association, Inc. v. Virginia*, 484 U.S. 383, 397 (1988).

As described in *Joseph H. Munson Company, Inc., supra*:

"Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court." 467 U.S. at 958.

In *New York v. Ferber*, 458 U.S. 747 (1982), following the guidelines of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), this Court emphasized that the overbreadth of the statute must be "substantial" before a party will be allowed to challenge it facially by asserting the rights of others not before the Court. Consistent with *Ferber*, the record and briefing herein reflect that the overbreadth is indeed substantial, particularly given the voluminous "flesh-and-blood" (458 U.S. at 768) examples provided in the amicus brief filed by the Thomas Jefferson Center, as well as the record statements by counsel for the two Erie dramatic theaters. Indeed, given the fact that only one of the original three nude dancing establishments continues to exist in Erie, the number of theaters on whose behalf this "substantial overbreadth" is asserted indeed *exceeds* the number of presently operating businesses which the City would assert are legitimately reached by the statute. In short, there is ample standing to bring a substantial

overbreadth attack in this case. Moreover, this point was raised at every stage of the appellate record below.

For all the reasons above, even if this Court were to reject all of Respondent's other challenges to Erie's ordinance, it should still find it facially invalid because of its substantial overbreadth in its censorial impact on others not before the Court.

G. As Construed And Applied By Erie Officials, The Ordinance Violates The First Amendment By Establishing A *De Facto* Local Censorship Board Which Administers A Discretionary System Of Prior Restraint.

The combination of the ordinance and the City's intentionally discriminatory enforcement scheme establishes a system of impermissible prior restraint analogous to the standardless licensing laws which this Court has consistently condemned.[25] In essence, City officials created a broad statutory net (prohibiting *all* performance nudity) but then exercise their unfettered discretion by employing content-based criteria to selectively enforce the ordinance only against those performances of which they disapprove.[26] The City has

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[25] *See*, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and numerous cases cited therein.

[26] Compare *Kolender v. Lawson*, 461 U.S. 352 (1983) where this Court struck down, on vagueness grounds, a statute requiring vagrants to provide "credible and reliable" identification, condemning it because it failed to " 'establish minimal guidelines to govern law enforcement.' " *Id.* at 358, quoting from *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Because the statutory net is so broad, it allows " 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Id.* at 358, quoting from *Smith*, 415 U.S. at 575.

Likewise, as this Court noted in *City of Houston v. Hill*, 482 U.S. 451, 466-467 (1987), quoting from *United States v. Reese*, 92 U.S. (2 Otto) 214, 221 (1876):

proclaimed that it will exercise its own value judgments in picking and choosing between those nude performances which will and will not be prosecuted and will do so based on *its* perception of which performances are constitutionally protected (even though this Court has said that even nude barroom dancing is constitutionally protected). *See*, e.g., Jt. App. 53 where the City's attorney candidly informed the trial court that productions such as 'Equus,' 'Hair,' and 'O Calcutta' will not be prosecuted "[t]o the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression. . . . " *Id. This is precisely what the First Amendment forbids!*

The ordinance's failure to provide guidelines by which City censors may determine whether a particular work does or does not attain this "higher level of protected expression" violates a host of this Court's decisions striking vague schemes of censorship. In *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 617 (1976), this Court held that a municipal ordinance violated the First Amendment because it vested "in municipal officials the undefined power to determine what messages residents will hear." Just as discretionary licensing schemes have been routinely condemned by this Court as impermissible prior restraints (*see* n.25, *supra*), Erie's system is similarly flawed. Its ordinance flatly prohibits all expression of a certain type, but its municipal

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> "[I]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained."
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> "Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily . . . , yet only some individuals – those chosen by the police in their unguided discretion – are arrested." *Id.* at 466-467.

officials then decide which otherwise-prohibited performances will be allowed. This combination acts as a classic example of prior restraint. In essence, all speech is prohibited until municipal officials, applying unwritten and subjective standards, decide which speech will be allowed.

Similarly, in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), this Court struck down an ordinance banning the exhibition of films deemed "not suitable for young persons." *Id.* at 680. The defect in that case was the ordinance's failure to provide clear standards for determining which films would be prohibited and which would be permissible. Consequently, it allowed local officials to play the role of unbridled censors, just as the Erie ordinance does here through the City's selective enforcement policy.[27]

Likewise here, Erie has cast a broad net proscribing all nude performances, but then informally, and subject to unwritten and arbitrary standards, establishes content-based exemptions. As this Court stated in *Ladue v. Gilleo*, 512 U.S. 43 (1994):

> "[T]hrough the combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for . . . truth.' " *Id.* at 2043.

Nor is there anything to guarantee that all City officials will apply the ordinance consistently, nor that subsequent City administrations will do so either. In short, this is the ultimate example of a standardless, discretionary prior restraint.

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[27] This Court noted that its holding in *Interstate Circuit* was consistent with numerous prior cases prohibiting censorship schemes based upon vague concepts of protecting public morals. 390 U.S. at 682-683.

H. Even If The Ordinance Did Not Directly Prohibit A Unique Type Of Protected Expression, It Could Not Be Sustained Under *O'Brien*'s Intermediate Scrutiny Test.

Even if Erie's anti-nudity ordinance did not directly prohibit the content of protected non-obscene expression, it would still fail under the intermediate scrutiny test of *United States v. O'Brien*. In *Barnes*, four members of this Court concluded that an Indiana public anti-nudity statute of truly general application could withstand scrutiny under *O'Brien*. For at least three distinct reasons, the present ordinance cannot survive such scrutiny.

1. Contrary to the Indiana statute in *Barnes*, the Erie Ordinance cannot survive under *O'Brien* because its enactment was not unrelated to the suppression of free expression.

The Indiana statute in *Barnes* represented what is likely to be a very rare circumstance; an anti-nudity statute of truly general application which was enacted with no thought of suppressing any type of expressive performances. As such, the four members of this Court who considered *O'Brien* applicable in *Barnes* concluded that the Indiana statute met the *O'Brien* requirement that the law be "unrelated to the suppression of free expression." 391 U.S. at 377. In sharp contrast, the Erie ordinance announces that it was enacted "for the purpose of limiting a recent increase in nude live entertainment within the City." Cert. App. 42a. Since eight members of this Court decisively ruled in *Barnes* that live nude entertainment was in fact within the protection of the First Amendment, Erie's ordinance proclaims a specific purpose to limit or suppress protected expression.

Likewise, the comments of each of the four City Council members who voted for this ordinance indicated their intention to use it primarily, if not exclusively, against live nude entertainment establishments. Jt. App. 36-48. Also, given that Pennsylvania already had a public indecency statute which

effectively prohibited all non-consensual public nudity, the Erie ordinance could have served little purpose *other than* the prohibition of nudity in consensual expressive performances. As if this were not enough, the City's own attorneys have affirmed that the City intends to discriminate between those nude performances it favors and those it disfavors (even though all of them are, under the holding in *Barnes*, within the protection of the First Amendment). This is the clearest possible evidence that this ordinance is not unrelated to the suppression of free expression.

For all of these reasons, the Erie ordinance clearly fails *O'Brien*'s requirement that the governmental interest be unrelated to the suppression of free expression.

2. The Erie Ordinance also fails *O'Brien*'s requirement that it further "an important or substantial governmental interest."

Even apart from its failure to meet *O'Brien*'s requirement that it be unrelated to the suppression of expression, Erie's ordinance also fails because of an inadequate demonstration that it furthers any "important or substantial governmental interest." *O'Brien*, 391 U.S. at 377.

In *Barnes*, four Justices, applying two differing rationales, expressed their belief that Indiana's broad and generally applicable anti-public nudity statute furthered a sufficiently substantial governmental interest to satisfy *O'Brien*. However, neither the reasoning of the plurality nor Justice Souter's concurring opinion in *Barnes* should be applied to sustain the ordinance challenged *here*.

a. The Erie Ordinance cannot be upheld by the mere assertion of a governmental interest in promoting public morality.

The Chief Justice's opinion for the plurality in *Barnes* concluded that the Indiana statute satisfied *O'Brien*'s requirement that it further an important or substantial governmental

interest based upon the assertion of "a substantial government interest in protecting order and morality." 501 U.S. at 569. No other members of the Court agreed that such a purpose was a permissible one for a restriction on protected expression, and at least five Justices clearly rejected that approach.[28] Accordingly, *Barnes* itself is precedent for the conclusion that a majority of this Court has rejected the notion that a societal interest in protecting order and morality can, alone, justify the application of an anti-nudity ordinance in the context of expressive performances before willing adults.

More significantly, it is not at all clear that all of the Justices comprising the *Barnes* plurality would find Erie's governmental interests identical to Indiana's, because there is direct evidence that *Erie* did not consider *all* public nudity to be inherently immoral (having declared that public nudity in performances such as 'Equus' and 'Hair' would be allowed). Such concessions undermine the credibility of Erie's assertion that the interests underlying its ordinance are substantial or important.[29] Stripped to its essentials, Erie is really saying that it has a moral interest in banning those nude performances it dislikes, but not those it favors. Unlike Indiana, it does not assert an interest in preventing *all* public nudity or even *all* nude performances. Accordingly, this Court need not

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[28] Justice Souter (who concurred in the judgment) expressly rejected the assertion that promotion of public order and morality was a sufficiently substantial governmental interest under *O'Brien* to justify a restriction on expression. The four dissenters, of course, necessarily rejected the "public morality" position of the plurality opinion.

[29] *See*, e.g., *Ladue v. Gilleo* where this Court stated:

> "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place. *See*, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-426 (1993)." *Id.* at 52-53.

even reject the plurality's reasoning in *Barnes* to reject its application in the present case.

Beyond that, the position taken by the plurality in *Barnes* is inherently dangerous because it places the protection of expression on a precariously slippery slope. What is considered "immoral" or "immodest" is inherently subjective and arbitrary. One municipality's city council may have a totally different concept of what is "immoral" or "immodest" than either its own successors or predecessors or the legislative body of a neighboring township. In the earlier hypothetical, a small community with an Islamic majority on its City Council could, in good faith, prohibit women from showing their faces in public. If an interest in "protecting order and morality" were sufficient, *per se*, for a restraint on expression, such an ordinance would be permissible and, as in *Barnes*, would be unrelated to expression (according to the rationale of the plurality opinion) because it would apply to persons walking on public sidewalks as well as those engaging in expression.

Between the extremes of Erie's anti-nudity ordinance and an anti-facial exposure ordinance are innumerable "morality-based" clothing requirements that could be imposed by local governments, varying with the tastes, preferences or values of those few persons constituting a majority of the local legislative body. In short, morality alone is the most dangerous of all principles upon which to base the validity of speech-affecting legislation. The First Amendment requires much more to uphold a restriction on content than that the enacting body asserts a genuinely held belief that it is necessary for "protecting order and morality." 501 U.S. at 569.

This Court long ago resolved whether morality concerns alone could justify the suppression of constitutionally protected expression. *See*, e.g., *Kingsley International Pictures Corp. v. Regents of the University of The State of New York*, 360 U.S. 684 (1959), involving a film licensing statute which facially prohibited the licensing of "immoral" films but which, as narrowly construed by the New York Court of Appeals, only prohibited a motion picture "which approvingly

portrays an adulterous relationship." *Id.* at 688. As a result of the narrowing construction, this Court did not address the statute's potential vagueness but, instead, squarely addressed the question of whether morality concerns alone may form a permissible basis for a restraint on expression. This Court flatly rejected the concept that, absent obscenity, a state may ban speech solely because it "is contrary to the moral standards [or] the religious precepts . . . of its citizenry." *Id.* at 688.

Likewise, in the absence of proven obscenity, this Court has repeatedly held that expression may not be prohibited simply because it may be perceived as lewd, immoral, or indecent[30] nor may nudity alone form the basis for a prohibition of expression. *See*, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("nudity alone is not enough to make material legally obscene"); and *New York v. Ferber*, 458 U.S. 747, 765-766, n.18 (1982) ("nudity, without more, is protected expression"); and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (*accord*).

b. The ordinance cannot be upheld based upon Erie's assertion of a governmental purpose in preventing "secondary effects."

There are two compelling reasons why this Court should not adopt the position which Justice Souter articulated in *Barnes*. First, it would represent a significant departure from this Court's precedent, allowing for the first time essentially rational basis scrutiny for a restriction on expression. Second, it would allow use of "secondary effects" as a basis for meeting the *O'Brien* test, even though the statute upheld in *O'Brien* was concerned exclusively with the *direct* effects of its violation and only because of that did this Court uphold

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[30] *See*, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989); and *Miller v. California*, 413 U.S. 15 (1973).

the statute without examining the record for proof of content-neutrality.

(1) This Court should not adopt rational basis scrutiny for *any* restriction of constitutionally protected expression.

One of the difficulties with Justice Souter's analysis of the statute in *Barnes*, is that it permits content-neutrality to be determined by *post-hoc* assertions of "secondary effects," even if such effects were never actually considered by the enacting legislature.[31] This, is not even "intermediate" scrutiny but, instead, is the distinguishing characteristic of mere "rational basis" scrutiny whereby any *post-hoc* justification may sustain legislation. Because of the ease with which "*post-hoc* rationales" may be hypothesized to support virtually any pretextual legislation, such justifications have never been tolerated in expression cases where the dangers of censorship masquerading under the guise of content-neutral legislation are so severe.

The only case cited in Justice Souter's *Barnes* concurrence in support of this method of *post-hoc* analysis is *McGowan v. Maryland*, 366 U.S. 420 (1961). However, *McGowan* is inapposite because the use of rational basis scrutiny there did not involve any expressive interest or other recognized fundamental constitutional right. Specifically, in *McGowan*, this Court upheld a Sunday closing law requirement against the challenge of "seven employees of a large discount department store." 366 U.S. at 422. This Court concluded that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. However, the fact that *McGowan* did not

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[31] "Our appropriate focus is not an empirical enquiry into the *actual* intent of the enacting legislature, but rather the existence or not of a *current* governmental interest in the service of which the challenged application of the statute may be constitutional." 501 U.S. at 582. (Souter, J., concurring, emphasis added.)

involve infringement of any fundamental rights is evidenced by this Court's observation there that the defendants who challenged the Sunday closing law "allege only economic injury to themselves; they do not allege any infringement of their . . . religious freedoms. . . . In fact, the record is silent as to what appellants' religious beliefs are." Accordingly, the use of rational basis scrutiny to uphold a law based solely on *post-hoc* justifications was unremarkable in *McGowan* because this Court did not recognize the presence of any threat to First Amendment rights in that case.

Moreover, Justice Souter's concurrence in *Barnes* now conflicts with a recent square holding of this Court in *Turner II* that in intermediate scrutiny cases using the *O'Brien* test, the content-neutrality of a statute must be affirmatively demonstrated by evidence in the original legislative record (520 U.S. at 185, 195, 211[32]), rather than by *post-hoc* (and therefore more likely pretextual) justifications. *Cf. United States v. Virginia*, *supra*, 518 U.S. at 533 ("[t]he justification must be genuine, not hypothesized or invented *post-hoc* in response to litigation").

(2) *O'Brien* itself did not authorize upholding a law based on so-called "secondary effects."

O'Brien is also quite distinguishable in that the statute was not justified on the basis of any asserted "secondary" effects, but rather because of the *direct* harm caused by the prohibited act itself, i.e., the destruction of the draft card. Where a prohibited act itself directly causes injury, there is no

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[32] This Court stated that, under *O'Brien*'s test of intermediate scrutiny (520 U.S. at 185), its "sole obligation is 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences *based on substantial evidence*' " (*id.* at 195) (quoting from *Turner I*, 512 U.S. at 666, emp. added), and that a content-neutral purpose must be "supported by substantial evidence *in the record before Congress*." (*id.* at 211, emp. added).

need for a documented legislative record to demonstrate the content-neutrality of the government's purposes; such purposes are obvious from the harm which is directly prohibited. In contrast, where the only rationale offered for a speech restriction is prevention of asserted "secondary" effects, the potential for pretextual legislation is far greater and compels, as held in *Turner II* and *U.S. v. Virginia*, rejection of proposed *post-hoc* justifications.

3. This Court has consistently rejected the notion of a secondary level of protection for any type of non-commercial expression, including sexually oriented expression.

While this Court has developed a very limited number of categories of expression which are deemed to lack First Amendment protection (e.g., obscenity, child pornography, libel, and speech posing a "clear and present danger"), a majority of this Court has consistently *rejected* the proposition that the amount of protection for non-commercial[33] protected expression could vary according to the value attributed to it by any five members of this Court.[34] *See*, e.g., Judge Kozinski's opinion in *United States v. United States District Court (Kantor)*, 858 F.2d 534, 541-542 (9th Cir. 1988), summarizing this Court's initial explorations of this issue and this Court's rejection of the contention (which originated with a plurality opinion in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70-71 (1976)), that sexually oriented expression

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[33] I.e., speech which does no more than propose a commercial transaction.

[34] *See*, e.g., *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 762-763 (1978), where Justice Brennan's dissenting opinion noted:

> "For the second time in two years . . . , the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of the Court."

is entitled to a lesser amount of constitutional protection than other protected expression. A majority of this Court clearly rejected that proposition in both *Young* and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761-62, n.4 (1978), and concurring opinion of Justice Powell, *id.* at 762-763.

More recently, a majority of this Court implicitly, but decisively, again rejected the notion that sexually oriented expression is entitled to a lesser degree of protection than other expression in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Fifth Circuit Court of Appeals had expressly refused to apply this Court's prior restraint doctrine to Dallas' adult business licensing ordinance on the asserted ground that sexually oriented businesses are entitled to less First Amendment protection than other types of protected expression. *FW/PBS, Inc. v. City of Dallas*.[35] However, this Court disagreed and accorded full prior restraint scrutiny to Dallas' licensing scheme, even though the only expression involved was sexually oriented.

Consistent with the foregoing, this Court has repeatedly reaffirmed the constitutionally-protected status of non-obscene sexually oriented expression not involving minors and has not qualified that protection in any way. *See*, e.g., *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989)[36]; and *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)[37].

---

[35] After first conceding that prior restraint standards apply fully to the licensing of *religious* activity, the Fifth Circuit stated:

> "[T]he First Amendment protection required for religious activity . . . is a different order than the protection due sexually oriented businesses.
>
> "We find that the Dallas ordinance, like the ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions." *Id.* 837 F.2d 1298, 1302-1303 (5th Cir. 1988).

[36] "Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale

Finally, *Barnes* is not to the contrary. Other than Justice Scalia, every member of this Court held that even sexually oriented expression involving live nude performances is protected by the First Amendment. No Justice suggested that material even at the outermost limits of First Amendment protection is somehow subject to a lesser level of protection than other expression or that some necessarily arbitrary "sliding scale" of protectedness should be created for expression. In short, this Court's precedents establish that material either *is* or *is not* constitutionally protected and the relevant standards and protections for speech do not and should not vary depending upon its subject matter.

4. The ordinance is not narrowly tailored to establish a reasonable fit between its purposes and its scope.

a. Because there is no *pre-hoc* evidence of either direct or secondary harms in this record, the Court should not even *reach* the "narrow tailoring" issue.

As noted above, the Erie City Council had before it no evidence of any direct *or* secondary harms caused by nude entertainment. Accordingly, under the test of *Turner II*, the ordinance cannot be deemed content-neutral and, consequently, this Court should not even *reach* the issue of narrow tailoring. *Turner II* holds that where intermediate scrutiny

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of such material to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* at 126.

[37] "[N]onobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment. [Citations omitted.] In the light of these decisions, one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults." *Id.* at 72-73.

applies under the *O'Brien* test, *post-hoc* justifications are impermissible, at least for proving content-neutrality.[38]

b. Even if *post-hoc* evidence of secondary effects could properly be considered to demonstrate content-neutrality, this record contains no such evidence.

Notwithstanding *Turner II* and *U.S. v. Virginia*, if this Court were nonetheless inclined to allow content neutrality to be proven by *post-hoc* evidence, Erie would still be unable to demonstrate content-neutrality because it did not even place any *post-hoc* evidence in the record to demonstrate any actual need for the ordinance.

c. Even if this Court were inclined to *assume* content-neutrality, *Turner II* requires evidence to show *narrow tailoring*, and there is no such evidence here.

While *Turner II* holds that *post-hoc* evidence is not admissible to demonstrate content-neutrality, such evidence *is* admissible, assuming the existence of a proven content-neutral ordinance, to determine whether the ordinance is

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[38] *Compare Turner II* (applying intermediate scrutiny and requiring proof of evidence of content-neutrality in the record before Congress, 520 U.S. at 211), and *U.S. v. Virginia*, *supra*, with *Renton*, *supra*. While *Renton* allowed cities to rely on evidence "already generated by other cities," 475 U.S. at 51, it nonetheless required that they in fact *actually relied* on some such evidence. *See* 475 U.S. at 51; a content-neutral zoning ordinance will be found to be narrowly tailored "so long as whatever evidence the city *relies upon* is reasonably believed to be relevant to the problem that the city addresses." (Emphasis added.) Since Erie *considered* no evidence of secondary effects, it cannot assert that it *relied* on such. Accordingly, Erie's failure to consider any evidence of secondary effects is fatal to its entitlement to prevail under a test of intermediate scrutiny.

"narrowly tailored."[39] However, even if this Court were to depart from *Turner II* and simply *assume* the *content-neutrality* of Erie's ordinance, such an assumption would not relieve Erie of its failure to demonstrate affirmatively whether this ordinance is *narrowly tailored*.

A narrow tailoring analysis under *O'Brien* requires a comparison of the evidence demonstrating the *need* for a regulation with its *scope*. (*Compare Turner II*.) Absent such evidence, any analysis of narrow tailoring is meaningless. Because the City has not placed in the record ewen any *post-hoc* evidence of need for the ordinance, it cannot demonstrate that its ordinance is narrowly tailored.

d. Even if this Court were to allow unsupported assertions of need to be used im a narrow-tailoring analysis, the ordinance would still fail to be narrowly tailored.

(1) Respondent is entitled to use the "reasonable fit" test from commercial speech cases in analysis of the "narrow tailoring" issue.

The final *O'Brien* test commands that any "incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest." 391 U.S. at 377. While literally a "least restrictive means" test, *O'Brien* was clarified in *Ward v. Rock Against Racism*, 491 U.S. 781, 796-799 (1989), to require only "narrow tailoring" such that a law may be sustained even if it restricts First Amendment freedoms to a *greater* extent than is "essential to the furtherance" of the governmental interest.

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[39] *See Turner I* which, after first finding sufficient evidence before Congress to demonstrate content-neutrality, remanded for additional evidence on the issue of whether the "must-carry" statute was narrowly tailored (thus necessitating *Turner II*).

In *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430 (1993), this Court held that the *Ward* test is applicable to commercial speech restrictions and that no more rigorous tests should be used to determine the validity of commercial speech than time, place and manner restrictions:

> "The *Ward* holding is applicable here, for we have observed that the validity of time, place or manner restrictions is determined under standards very similar to those applicable in the commercial speech context and that it would be incompatible with the subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard to commercial speech than is applied to fully protected speech."

Since this Court has now modified *O'Brien*'s original "least restrictive means" test, equating it instead to time, place and manner "narrow tailoring," then, under *Edge Broadcasting*, it should, at the very least, allow Respondent to utilize the "reasonable fit"/"narrow tailoring" test routinely utilized in commercial speech cases, as *Edge* holds that the tests for commercial speech cases may not be *more* rigorous than the tests used in time, place and manner cases.

Respondent respectfully submits that the "reasonable fit" requirement for commercial speech cases is far more favorable to it than the "narrow tailoring" tests employed in this Court's time, place and manner decisions. Specifically, beginning with *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court has repeatedly held that "narrow tailoring" in the context of commercial speech cases requires that there be a "reasonable fit" between the asserted governmental justifications for a law and its scope. *See*, e.g., *Fox*, 492 U.S. at 480; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 414 (1993); *Edge Broadcasting*, 509 U.S. at 429; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 507 (1996) (plurality opinion); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-487 (1995). The Court has been quite clear

in articulating the precise analysis that applies to this "reasonable fit" requirement. For example, in *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court stated:

> "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction *will in fact alleviate them to a material degree*." *Id.* at 770-771.[40] (Emphasis added.)
>
> "[A] regulation may not be sustained if it provides *only ineffective or remote support* for the government's purpose."[41] *Id.* at 770. (Emphasis added.)

(2) There is no reasonable fit between the City's unsupported asserted purposes and the scope of the ordinance.

Utilizing the narrow tailoring test applicable to commercial speech, a type of expression this Court has already found "subordinate," it is clear that Erie's anti-nudity ban is not narrowly tailored, because it provides, at best, "only ineffective or remote support for the government's purpose" and does not advance its interests "to a material degree."

Assuming, *arguendo*, that Erie may use the unproven and self-proclaimed purposes listed in the ordinance's preamble to support its assertedly "incidental" restriction on the content of expression (an assumption rejected by Respondent), there is still no reasonable fit between such stated purposes and the scope of the ordinance. The preamble to the ordinance candidly declares that the City's purpose is to prohibit nude live entertainment on the hypothesis that such "activity adversely impacts and threatens to impact the public health, safety and

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[40] *Accord*: *Rubin v. Coors Brewing Co.*, 514 U.S. at 486-487; and *44 Liquormart*, 517 U.S. at 505 (per Justices Stevens, Kennedy, Souter and Ginsburg).

[41] *Accord*: *44 Liquormart*, 517 U.S. at 505 (per Justices Stevens, Kennedy, Souter and Ginsburg).

welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." (Cert. App. 42a).

Nowhere does the City explain why placing pasties and g-strings on an erotic dancer or other performer will have a significant impact in reducing any of the asserted problems described in the ordinance's preamble. There are existing criminal laws which prohibit violence, public intoxication and prostitution and civil laws which address sexual harassment. Indeed, there are many other far less restrictive alternatives to deal with the asserted problems besides a total prohibition on the content of expression. Moreover, if a particular business is found to be a source of prostitution offenses, the State has an extremely effective remedy against such businesses under existing public nuisance laws. *See*, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Given these effective sanctions, it is the unusual business owner who would not self-regulate in order to prevent such draconian consequences.

Most importantly, Respondent reiterates that there is simply no reason to believe that the placing of pasties and g-strings on a dancer or other performer will have any type of significant impact on any of the concerns articulated in the preamble. In short, there is simply not a material fit between the scope of the regulation and the purposes it assertedly furthers.

CONCLUSION

For all the reasons above, the judgment of the Pennsylvania Supreme Court did not violate the Supremacy Clause, even if its reasoning may have improperly analyzed the Supremacy Clause issues. Accordingly, the judgment of the Pennsylvania Supreme Court should be affirmed on that basis and the Court should not proceed to address any issues not raised in the Questions Presented.

Alternatively, should the Court address the First Amendment issues in this case *sua sponte*, for each of the numerous foregoing reasons, the judgment of the Pennsylvania Supreme Court should be affirmed.

DATED: September 30, 1999

Respectfully submitted,

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G. RANDALL GARROU
WESTON, GARROU & DEWITT

PHILIP B. FRIEDMAN
AMBROSE, FRIEDMAN & WEICHLER

Attorneys for Respondent

**Counsel of Record*

APPENDIX A

Vote On Ordinance No. 75-1994

We do hereby certify that the above ordinance was finally passed by the City Council on September 28, 1994.

SIGNED September 28, 1994

Attest: September 28, 1994

Chris E. Maras
President of Council

James Klemm
City Clerk

THIS ORDINANCE APPROVED THIS 30th DAY OF September, 1994.

Joyce A. Savocchio
Mayor

September 28, 1994. City Council on motion of Mr. Thompson, Seconded by Mr. Brabender, having read Council File Ordinance 14,482, finally pass Council File Ordinance No. 75-1994, by yeas Council Members Bagnoni, Brabender, Thompson, Maras. 4. Nays. Brzezinski and Wright. 2. (Mrs. Robinson was absent)

A TRUE COPY
Attest:

/s/ James Klemm
James Klemm, City Clerk

APPENDIX B

Questions Presented In Certiorari Petition and Brief In Opposition Filed In *United States v. X-Citement Video, Inc.*, 513 U.S. 54 (1994)

No. ___

In the Supreme Court of the United States
October Term, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC., AND RUBIN GOTTESMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that 18 U.S.C. 2252, which proscribes the transportation, shipment, receipt, and distribution of child pornography, is unconstitutional on its face on the ground that it does not require the government to prove that the defendant knew that the materials at issue show minors engaging in sexually explicit acts.

No. 93-723

In the
Supreme Court of the United States
October Term, 1993

UNITED STATES OF AMERICA,

Petitioner

v.

X-CITEMENT VIDEO, INC.,
and RUBIN GOTTESMAN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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**Counsel for Respondents*

QUESTION PRESENTED

Whether the Court of Appeals correctly held that 18 U.S.C. § 2252 – which makes punishable a person who "knowingly transports or ships" or who "knowingly receives, or distributes" a visual depiction, "if" the depiction is of a minor engaging in sexually explicit conduct – violates the First Amendment because the statutory language unambiguously imposes no scienter of age requirement, and the legislative history reveals that Congress clearly and deliberately declined to impose any such scienter requirement.

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(24)

Supreme Court, U.S.
FILED
NOV 1 1999
OFFICE OF THE CLERK

No. 98-1161

IN THE

SUPREME COURT OF THE UNITED STATES

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS

V.

PAP'S A.M., T/D/B/A "KANDYLAND,"

RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONERS

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14 pp

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SUMMARY OF ARGUMENT

Respondent Pap's A.M. seeks to minimize the significance of the Pennsylvania court's error by characterizing the opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as that court did. If the *Barnes* opinion is so fragmented as to defy reduction to a controlling principle, then the Pennsylvania court's disregard of the Supremacy Clause and the principles of *stare decisis* loses some of its impact.

The *Barnes* decision is not, however, so unworkable as Pap's A.M. and the Pennsylvania court represent. The lower courts interpreting *Barnes* have had little difficulty with its basic tenets: (1) nude erotic dance is expressive conduct, and (2) restrictions on nude erotic dance are to be evaluated under the framework set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The plurality and concurring opinions in *Barnes*, though different, are not irreconcilable.

Pap's A.M.'s belated support for the decision of the Pennsylvania Supreme Court is unpersuasive. Pap's relies heavily on the public remarks of members of Erie's City Council as evidence that the ordinance is impermissibly content-based. These unsworn public expressions of personal support do not constitute irrefutable evidence of improper, illicit legislative motive. The personal reasons motivating a legislator to support an ordinance are not germane to the discussion of its validity.

Despite its protests to the contrary, Pap's A.M. attempts to draw the discussion far away from the only issue properly before the Court. It is not necessary for the resolution of the issue presented to re-litigate *Barnes* or revisit *O'Brien*.

ARGUMENT

I. PAP'S A.M.'S EXTRAJUDICIAL SUPPORT FOR THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS UNPERSUASIVE.

A. Pap's A.M. overstates the difficulty of interpreting and applying *Barnes*.

The *Barnes* opinion is made up of a plurality opinion, two concurrences, and a dissent. Neither concurrence is so distant in its analysis from the plurality or the other concurrence as to render *Barnes* impenetrable.

The plurality and Justice Souter agree that the Indiana statute reviewed in *Barnes* withstands scrutiny under the *O'Brien* test. 501 U.S. at 572 (plurality opinion), 587 (Souter, J., concurring). Justice Scalia's concurring opinion does not reject public order and morality as an appropriate governmental interest unrelated to the suppression of expression. 501 U.S. at 575. Neither does it reject the *O'Brien* analysis where a regulation of conduct incidentally burdens expression. *Id.* at 577. Justice Scalia differs only by finding no burden on expression sufficient to trigger the protection of the First Amendment in the statute then under review. *Id.* at 580.

The *Barnes* opinion has proved nowhere nearly so troublesome to lower courts as, for instance, the opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley I")*, 478 U.S. 546 (1986). Before *Delaware Valley I*, there was a split in the circuit courts over the availability of contingency fee multipliers under federal fee-shifting statutes. *Delaware Valley I* failed to resolve the issue. On rehearing the Court issued a divided opinion, *Pennsylvania*

v. Delaware Valley Citizens' Council for Clean Air ("Delaware Valley II"), 483 U.S. 711 (1987). That opinion again split the circuits. *See*, Kyle R. Kravitz, Note, *Denying the Devil His Due: Contingency Fee Multipliers After City of Burlington v. Dague*, 38 VILL. L. REV. 1661 (1993).

In the Third Circuit alone, the *Delaware Valley II* opinion sent the same case from the Court of Appeals back to the District Court, and back again to the Court of Appeals with acerbic commentary from the District Court. *Blum v. Witco Chemical Corporation ("Blum II")*, 888 F.2d 975 (3d Cir. 1989). The debate over the availability of contingency fee multipliers was finally put to rest by a third opinion of this Court, *City of Burlington v. Dague*, 505 U.S. 557 (1992).

Similar difficulties plagued the opinion in *Baldasar v. United States*, 446 U.S. 222 (1980). *See*, Kerry R. Northrup, Note, *Nichols v. United States: Using Prior, Uncounseled Misdemeanor Convictions to Enhance Sentences - A Dispute Resolved*, 40 VILL. L. REV. 475 (1995). There is far less confusion among the lower courts in the application of *Barnes*. Some attempts at *Barnes*-style ordinances have not survived scrutiny. The level of scrutiny and the analysis employed, however, have been consistent. The Pennsylvania Supreme Court stands alone in its rejection of *Barnes* as a case devoid of precedential reasoning.

Pap's A.M. cannot downplay the significance of the Pennsylvania court's disregard of the result in *Barnes*. Lower courts interpreting federal law are unavoidably bound by the "result *stare decisis*" doctrine "mandat[ing] that any specific result espoused by a clear majority of the Court should be controlling in substantially identical cases." Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*,

80 COLUM. L. REV. 756, 779 (1980). Because Erie's ordinance is substantially indistinguishable from the statute in *Barnes*, the Pennsylvania court was constrained to uphold it.

B. Pap's A.M.'s attempts to distinguish Ordinance 75-1994 from the statute in *Barnes* are unconvincing.

The various arguments advanced by Pap's A.M. to distinguish Erie's ordinance from the statute in *Barnes* state and restate the proposition that Erie's ordinance is content-based and narrowly targeted only at nude erotic dancing. The arguments focus on one phrase in the preamble. [Respondent's Brief at 8].

Excluded from Respondent's argument are two more prominent statements of intention. The preamble also states

> Council is fully aware of and fully respects the fundamental constitutional guarantees of free speech and free expression and realizes that restrictions of such freedoms must be carefully drafted and enforced so that speech and expression are not curtailed beyond the point at which it is essential to further the City's interest in public health, safety and welfare.

[Pet. App. A at 7a]. In addition, the ordinance at Section 1, paragraph 6 provides

> CONSTRUCTION AND SEVERABILITY - It is the intention of the City of Erie that the provisions of this ordinance be construed, enforced and interpreted in such a manner as will

> cause the least possible infringement of the constitutional rights of free speech, free expression, due process, equal protection or other fundamental rights consistent with the purposes of this ordinance.

[Pet. App. A at 9a].

The Court of Appeals for the Ninth Circuit has adopted a useful analysis for evaluation of enactments burdening speech. The circuit court examines the full record for objective indications of intent set out in *City of Las Vegas v. Foley*, 747 F.2d 1294 (1984). The factors considered include the face of the statute, the effect of the statute, comparison to prior law, facts surrounding the enactment, the stated purpose, and the record of the proceedings. *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), quoting *Las Vegas v. Foley*.

Erie's public indecency ordinance, on its face and in its effect, is intended to replace provisions more than a century old with "new language consistent with current state and federal law." The ordinance is explicitly tied to the concept of public indecency embodied in the Indiana statute reviewed in *Barnes*. [Pet. App. A at 7a].

The circuit court in *Colacurcio* reviewed the subjective views of the legislators for "objective manifestations of an illicit purpose." 163 F.3d at 552. Absent such indicia as extraordinary procedural measures, procedural lapses, or hasty changes in City policy, the *Colacurcio* court did not find illicit purpose. *Id.* In *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (1991), the Court of Appeals for the Fourth Circuit recognized that Myrtle Beach enacted its ordinance in response to D.G. Restaurant's application for a

building permit. D.G. Restaurant's plan was treated by the circuit court simply as a triggering event. The court there found no improper motivation. *Id.* at 146.

The Ninth Circuit has adopted a predominant intent standard, following *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The circuit court acknowledged the difficulty in distinguishing between a motivating factor which does not invalidate an ordinance and predominant intent, which does. *Colacurcio* at 551. The Court of Appeals for the Eleventh Circuit has observed that reference to content is not equivalent to suppression of content. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (1998).

Respondent would establish intent to suppress only one form of expression by emphasizing one phrase in the ordinance and isolated statements of Council members. The ordinance taken as a whole does not evidence illicit legislative motive. Nor do the unsworn public statements of the Council members supporting the ordinance show a predominant intent to suppress expression. The record as a whole clearly shows paramount concern for the protection of free expression. Only incidental encroachment on expression, where such encroachment is essential to promote the public health, safety and welfare, is tolerated under Erie's public indecency ordinance.

II. RESPONDENT'S OPTIONAL QUESTION PRESENTED IS NEITHER SET OUT IN NOR FAIRLY INCLUDED IN THE QUESTION PRESENTED.

This Court's Rule 14.1(a) states the scope of the issues before the Court in this matter. The Court will consider only

questions set out in the petition for certiorari or fairly included therein. An issue is fairly included in the question presented "when the issue must be resolved in order to answer the question." *Missouri v. Jenkins*, 515 U.S. 70, 145 (1995) (Souter, J., dissenting)(citations omitted).

Respondent's Optional Question Presented is tangential to the only question raised by the petition for certiorari but entirely unnecessary for the disposition of the question. An affirmative response to Pap's A.M.'s question would undo both *Barnes* and *O'Brien*. The City has not raised any question requiring relitigation of *Barnes*. The City's question takes the *Barnes* decision as a settled statement of law and asks only whether the Pennsylvania court was required to do the same.

Rule 14.1(a) does not limit the Court's power to decide questions not raised by the parties. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). But where an issue has not been raised by the petitioner and is not necessary to the disposition of the petitioner's issue, the rule raises a strong presumption against consideration of a question newly raised after certiorari has been granted. *Yee v. City of Escondido, California*, 505 U.S. 519 (1992). In a different case the various First Amendment issues raised by Pap's A.M. could stand side-by-side with the issue raised by the City. *See Yee* at 537 (both questions could be subsidiary to a third question, but neither is encompassed by the other). This case is not, however, the "most exceptional case" warranting a departure from Rule 14.1(a). *Izumi Seimitsu v. U.S. Philips Corp.*, 510 U. S. 29, 32 (1993) (citations omitted).

Respondent Pap's A.M. candidly admits that its Optional Question Presented is extraneous to the City of Erie's issue, and purportedly agrees that its First Amendment arguments are not

properly before the Court. [Respondent's Brief at 15-16]. Respondent then cites to *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), which in turn quotes *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), for the proposition that a prevailing party may make new arguments in support of the judgment below. The arguments made here by Pap's A.M., however, go well beyond the argument allowed by the Court in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995). In *Lebron*, the resolution of the disputed issue was a prerequisite for the resolution of the question raised by the petition for certiorari. Respondent Pap's A.M. here presents a distinct and unrelated question.

Neither does Pap's A.M. present an issue "not pressed or passed upon." Pap's alternate argument, that Erie's ordinance is fatally overbroad, was raised before the Pennsylvania Supreme Court. The Pennsylvania court granted review of the issue [Pet. App. E at 69a] but did not decide it. The Court in *Illinois v. Gates*, 462 U.S. 213 (1983), noted particular concerns with addressing a question not decided by the state's highest court in a case originating in the state courts. There is some question as to whether the Court's certiorari jurisdiction under 28 U.S.C.S. § 1257 encompasses a question not decided by the state court. *Gates* at 219 (citations omitted).

The *Gates* Court also cited compelling prudential considerations underlying the "not pressed or passed on below" rule. 462 U.S. at 224. The First Amendment issues Pap's A.M. raises by its Optional Question Presented are difficult and important, just as the exclusionary rule issue in *Gates* was. Scrupulous adherence to customary limits on the Court's discretion will serve in this case, as it did in *Gates*, to promote respect for the adjudicatory process and the stability of the Court's decisions. *Id.*, quoting *Mapp v. Ohio*, 367 U.S. 643 (1961).

CONCLUSION

The debate which brought the parties here to this Honorable Court will likely continue after the decision in this case is handed down. Freedom of speech and expression are fundamental to this nation's identity. There will always be those who resist any slight restriction on expression, fearing the proverbial "slippery slope." There will always be those who would seek to suppress a disfavored message.

The City of Erie's public indecency ordinance places no impermissible restriction on expression. The ordinance reflects this Court's determination that conduct, even when engaged in for expressive purposes, can be regulated. Where the regulation is sufficiently justified by an interest unrelated to the suppresion of expression, the incidental burden on expression can be tolerated. The Indiana public indecency statute in *Barnes* did not impermissibly restrict expression. Neither does the ordinance under review here. The decision of the Pennsylvania court must be reversed.

Respectfully submitted,

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JUL 1 - 1999

No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a KANDYLAND,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER CITY OF ERIE OF THE ERIE COUNTY CITIZENS COALITION AGAINST VIOLENT PORNOGRAPHY

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QUESTION PRESENTED

Whether the judgement of the Pennsylvania Supreme Court in *City of Erie, et al. v. PAP's AM t/d/b/a Kandyland, et al.*, should be reversed.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER CITY OF ERIE

Amicus Curiae Erie County Citizen's Coalition Against Violent Pornography has sought the consent of the parties to participate in this matter by filing of the enclosed brief. A consent letter from the Petitioner, the City of Erie, is on file with the Clerk in accordance with Rule 37.3. However, at least one of the opposing parties, the Respondent, PAP'S A.M., t/d/b/a/ Kandyland, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the City of Erie, to inform the Court of the interests of the residents of the local community to maintain their ability to regulate public nudity on the grounds that the residents have made a moral decision to disallow public nudity in their community and on the basis of preventing the secondary effects that are associated with adult entertainment. Further, Amicus seeks to show how the decision in *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991) was incorrectly decided and should be overturned. Finally, if *Barnes* remains intact, it has been ignored by the Pennsylvania Supreme Court to reach a decision that is inconsistent with this Court's prior decisions. Moreover, with the Pennsylvania Supreme Court's decision, there is now disagreement between lower courts interpreting this Court's holding in *Barnes*.

As set forth more fully in the "Interest of the Amicus Curiae" section of the attached brief, the Erie County Citizen's Coalition Against Violent Pornography is a group comprised of residents of Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography

and public nudity, including nude dancing at business establishments like Kandyland. Under the ordinance passed by the City of Erie, dancers at establishments like Kandyland were not permitted to dance totally nude. The dancers were required to wear "pasties" and "G-strings" to avoid being nude under the ordinance. While the Coalition would have preferred to not have the dancing establishment in existence at all, the Coalition has recognized the complexities of the law and regarded the ordinance as a satisfactory regulation of pornography and public nudity. However, since the Pennsylvania Supreme Court's ruling that overturned the statute, the dancers at the club have been dancing in full nudity.

The experience of the Amicus Curiae of dealing with the nude dancing establishment both before and after the ordinance was enacted offers an important practical aspect and analytical perspective on the issues presented by this case. In the instant case, the Amicus Curiae has experience with the nude dancing establishment's secondary effects that the ordinance would help prevent if enforced. The issue for the Amicus Curiae involves the fundamental judgment of whether or not public nudity can be regulated by a local governing body on the basis of moral concerns of the community and the interest of preventing the harmful secondary effects that accompany such establishments.

Amicus Curiae thus has a direct and important interest in the review of this case by this Court, and has a valuable perspective to offer concerning the legal issues presented therein. Amicus Curiae therefore respectfully

urges that the Court grant this Motion For Leave To File Brief *Amicus Curiae*.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE*

Amicus curiae, the Erie County Citizens Coalition Against Violent Pornography is a non-profit organization domiciled in the Commonwealth of Pennsylvania, and located in Erie County, Pennsylvania. The Coalition is opposed to all forms of pornography, including public nudity such as the type that is the subject of the instant case. The Coalition seeks to educate citizens in the legal and peaceful means available to them to oppose the spread of establishment of pornography in their communities.

The City of Erie attempted to regulate the public nudity at Kandyland by enacting an ordinance that required the dancers to wear modest coverings over parts of the female anatomy, commonly known as "pasties" and "G-strings." The City's ordinance was virtually identical to the Indiana statute this Court declared constitutional in *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991), as not unduly restricting a dancer's First Amendment right to freedom of expression. Some of the dancers and the owner of Kandyland challenged the ordinance, and eventually succeeded in having the statute overturned by the Pennsylvania Supreme Court.

The members of the Coalition live in the vicinity of the nude dancing establishment operated by the Respondent in the instant case. Kandyland is located in a

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* No person other than Counsel for Amicus Curiae authored this brief in whole or in part. No person or entity other than Amicus Curiae has made a monetary contribution to the preparation or submission of this brief.

residential area, and as such has an impact on the residents that live in the community near Kandyland. Moreover, residents of the community near Kandyland have asked the members of the Coalition for assistance in dealing with the existence of Kandyland in their neighborhood, as well as with dealing with the secondary effects that have accompanied Kandyland's operations. Thus, the resolution of the instant case will have a direct impact on the members of the Coalition and on their community at large as well.

Because the City's ordinance has been overturned by the Pennsylvania Supreme Court, the dancers at Kandyland, and other dancers at nearby clubs, have returned to dancing without any clothing in full public nudity. Thus, where the city's residents spoke through their council members to enact an ordinance restricting public nudity to a constitutionally permissible extent, the Pennsylvania Supreme Court has interjected an incorrect and untenable decision that ignores this Court's precedent to overturn the decision of the city council members. Amicus Curiae urges this Court to reverse the decision of the Pennsylvania Supreme Court.

SUMMARY OF ARGUMENT

Nude dancing is not deserving of First Amendment protection, and therefore *Barnes v. Glen Theatre, Inc., et al.*, 501 U.S. 560 (1991), was wrongly decided and should be overturned. The First Amendment does not protect nude dancing from regulation as a matter of course. Prior to this Court's decision in *Barnes*, nude dancing was not

necessarily regarded as expressive activity deserving of First Amendment protection, and therefore any regulation of nude dancing was not required to meet the four-part analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), or any other level of scrutiny under the First Amendment.

Prior to this Court's decision in *Barnes*, nude dancing was not considered to be deserving of First Amendment protection. This Court's own decisions never held that nude dancing was protected by the First Amendment, although a few decisions noted that there may be circumstances where nude dancing was protected. Nevertheless, prior to *Barnes*, nude dancing was not deemed deserving of First Amendment protection.

Even if the nude dancing at issue is found to be expressive conduct and entitled to some degree of protection from regulation, it cannot be said that it cannot be regulated at all. In the case where expressive conduct is regulated, the rationale of the *O'Brien* test applies, and the ordinance must be examined to see if it unconstitutionally regulates the conduct. In this case, the ordinance clearly passes the *O'Brien* test and should be upheld.

Society has regulated conduct for centuries based on moral judgements and values, and the present case is no different. Morality provides a more than adequate basis in this case to uphold the City of Erie ordinance. Moreover, the desire to prevent the secondary effects of nude dancing further buttresses the ordinance's constitutionality.

Amicus curiae will make two broad points in this brief: First, that nude dancing is not deserving of First

Amendment protection and that the Court should overturn the decision of *Barnes v. Glen Theatre, Inc., et al.* Secondly, if nude dancing is found worthy of protection under the First Amendment, the statutory scheme endorsed by *Barnes* and used in the instant case is a valid regulation of nude dancing, and therefore the decision of the Pennsylvania Supreme Court should be reversed.

ARGUMENT

I. NUDE DANCING IS NOT DESERVING OF FIRST AMENDMENT PROTECTION FROM GOVERNMENT REGULATION

The act of being nude in public in and of itself is not protected activity under the First Amendment. This Court noted itself in *Winters v. New York*, 333 U.S. 507, 515 (1948) that public nudity was a criminal offense at common law.[1] Public indecency statutes remain commonplace in today's society, expressing the moral judgment of society on public nudity. This moral judgment by society has long been recognized as a valid exercise of a government's power to protect societal interests in decency and morality.

The fact that nudity is combined with dancing in this case does not transform the respondent's conduct into protected activity because the ordinance at issue seeks to regulate nudity, not dancing. The act of the dance is not regulated, manipulated, monitored, or otherwise

[1] *LeRoy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664).

impacted by the ordinance. Therefore, there is no basis for arguing that nude dancing is somehow deserving of First Amendment protection.

A. Public Nudity is Not Protected by the First Amendment.

Public nudity in and of itself is not protected by the First Amendment. The act of being nude has long been regulated by governments, including the several states of the United States through the State's attendant police power. Where a society, through its government, determines that nudity in public is not acceptable pursuant to the government's police power, then no court should create a right where one has been denied by society at large.

It is clear from the language of the First Amendment that the act of being in the nude in public is not a fundamental right.[2] However, this Court has held that where conduct and speech converge in a single activity, the protections of the First Amendment may apply. This however, is not the case where a person seeks solely to be nude in public.

The act of being nude in public was considered an act malum in se at common law. Nothing has changed in

[2] The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." U.S. Const., First Amend.

today's society that would alter the legal landscape to warrant an expansion of the First Amendment to protect the act of being nude. In fact, the First Amendment was drafted by the framers of the Constitution with the full knowledge and understanding that a government would be able to use its inherent police power to protect the moral judgments of the citizenry.

This Court has recognized the ability of a government to regulate public nudity via its police power on several occasions. In *Barnes*, the Court traced the history of police power regulation of public nudity back to the common law and through the history of the anti-obscenity statutes passed in Indiana over the years. This case does not present any new arguments that lead to the conclusion that public nudity should be a protected Constitutional freedom. Therefore, this Court should reject any claims in this case that nudity alone is somehow expressive and therefore speech under the Constitution.

B. Nude Dancing is Not an Expressive Activity Protected by the First Amendment.

In order to qualify for First Amendment protection, an activity must become "speech" as defined by this Court's decisions. This Court has consistently held that nonverbal conduct can become speech when there is an intent to convey a reasonably perceivable, particularized message.[3] However, the Court's decisions tend to be

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[3] *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (flag with peace symbols affixed); *Tinker v. Des Moines Independent Community School*

limited to political messages where the proponent is attempting to convey a sincerely held belief, idea, or thought. Nude dancing, by its very nature, cannot rise to that level, and is therefore not an expressive activity.

This Court's prior decisions have held that determining whether conduct is speech requires an analysis of the "communicative elements" of the conduct to determine if it is within the parameters of the Free Speech Clause of the First Amendment. In order for conduct to implicate the Free Speech Clause, there must be (1) an intent to convey, (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. *Texas v. Johnson*, *supra*, and *Spence v. Washington*, 418 U.S. 405, 410 (1974).

Dancers do not necessarily have an intent to convey a message simply because they perform a dance. For instance, in *Dallas v. Stanglin*, 490 U.S. 19 (1989), this Court held that ballroom dancing was not within the parameters of the First Amendment. Dance is regularly associated with an intent to convey a message, but an intent to convey a message cannot be assumed. When the Court of Appeals in *Barnes* held that the nude dancing at issue was protected by the First Amendment, it noted a definition of "dance" from an encyclopedia.[4] But even that definition noted that dance is sometimes "simply to

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District, 393 U.S. 503 (1969) (wearing black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning draft card); and *Stromberg v. California*, 283 U.S. 359 (1931) (display of a red flag as opposition to government).

[4] The court cited 16 The New Encyclopedia Brittanica 935 (1989).

delight in the movement itself." Therefore, by definition alone, it cannot be assumed that every dance contains an intent to convey a message.

Nude dancing is particularly suspect to the analysis of whether a message is intended by the dancer. The message must be related to the dance, and not simply the act of being nude, because as noted *ante* in this brief, the act of being nude is not in and of itself conduct worthy of constitutional protection. Nudity after all, is a state of existence, not an act or particular conduct. So, if nude dancing is to be considered speech and within the First Amendment, the intent to convey a message must be related to the dance, and not the nudity. Here is where nude dancing fails to meet the requirements of *Texas v. Johnson, supra,* and *Spence v. Washington, supra*: a dancer must intend a message in the dance itself, and not in the act of being nude and dancing while nude. There is simply nothing in the record of this case that indicates that a dancer intended a message in the dance itself.

Further, even if there is an intent to convey a particular message, there must be a great likelihood that the message will be understood. While it is hard to imagine a message, assuming arguendo that there is a message intended, the likelihood that the recipient will understand the message is slim to none. It is not disputed that patrons of nude dancing establishments watch the dancers because they are nude. The patrons of such establishments watch the dancers to find gratification for their desires, not to receive a message from the dance itself. This is precisely why nudity has historically been regulated as criminal conduct and continues to be today. Nudity appeals to base human sexual desires, and society

has deemed that nudity should therefore remain outside of the public view and remain in the private lives of the citizenry. Thus, the avowed purpose of nude dancing is not to convey a message, it is to appeal to the desires of the viewer, and the viewer watches the dance because of the nudity, not the particulars of the dance.

Without the required intent, message, and likelihood of the recipient's understanding the message, nude dancing cannot be considered expressive activity.

C. *Barnes v. Glen Theatre, Inc., et al.* Was Wrongly Decided And Should be Overturned.

Barnes v. Glen Theatre, Inc., et al., supra, was wrongly decided and should be overturned. Prior to this Court's decision in *Barnes,* nude dancing was not regarded as necessarily worthy of First Amendment protection.

The *Barnes* decision was inherently flawed because the Court did not closely examine the nude dancing at issue in accordance with the test enunciated in *Texas v. Johnson, supra.* The *Barnes* decision cobbled together an array of prior cases that never directly held that nude dancing was constitutionally protected activity.

In *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975) and *California v. Larue,* 409 U.S. 109 (1972), the Court mentioned that nude dancing might, under the right circumstances, be entitled to First Amendment protection. However, the Court did not express exactly what those circumstances might be. Similarly in *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981), the Court noted that nude dancing was not without First Amendment protection,

but did not directly hold that it, in fact, was so entitled. These cases were the sum of the Court's reliance to find that the nude dancing in *Barnes* was protected activity.

Further, in *Barnes*, the record was clear that the plaintiffs failed to meet the requirements of intent, message, and recipient as required by *Texas v. Johnson, supra*. Plaintiff Miller had stated that she danced to get customers to buy drinks, and Plaintiff Sutro said she had a message, but could not articulate what the message was in particular. Thus, the record from *Barnes* shows that nude dancing is not entitled to First Amendment protection, and therefore the decision should be overturned, with the Court's holding being that nude dancing is not entitled to constitutional protection.

II. EVEN IF NUDE DANCING IS FOUND TO BE DESERVING OF FIRST AMENDMENT PROTECTION, THE ERIE ORDINANCE IS CONSTITUTIONAL

The seminal case on constitutional analysis where a government seeks to regulate protected conduct is *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court announced a four-part test: (1) whether the statute or regulation is within the constitutional power of the government to regulate; (2) whether it furthers an important or substantial governmental interest; (3) whether the governmental interest is related or unrelated to the suppression of free expression; (4) whether the incidental restriction on alleged First Amendment freedoms is no greater than is essential for the furtherance of the governmental interest. *O'Brien* at 376-77.

The Erie ordinance only seeks to regulate public nudity, not dancing. The ordinance does not restrict a person's ability to dance, the ability to dance in a certain time or place, or the audience of the dance. The ordinance simply restricts the act of being nude in public. Therefore, because the ordinance only regulates nudity, it is well within the police power of a government to regulate.

That an important governmental interest is present in this case is not in doubt. The Ordinance itself points out the interest at stake:

> WHEREAS, Council specifically wishes to adopt the concept of public indecency prohibited by the laws of the State of Indiana, which was approved by the Supreme Court in Barnes v. Glen Theatre, Inc., for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

City of Erie Ordinance 75-1994.

The Ordinance clearly has as its purpose therefore the prevention of harmful secondary effects associated with nude dancing clubs. The Ordinance's purpose tracks squarely with the Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), where the Court held that government attempts at controlling or preventing secondary effects associated with adult entertainment serve the government's substantial interest in promoting

the health, safety, and welfare of the people. Thus, the Erie ordinance passes the first *O'Brien* prong of requiring that the restriction be within the constitutional power of the government to regulate.

The second prong of *O'Brien* requires that the restriction actually further the governmental interest. In *City of Renton, supra,* the Court held that a government was not required to provide specific data to demonstrate that the perceived harmful effects correlate to the adult establishments. As restated in another case, "[t]he First Amendment does not require a city before enacting such an ordinance to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware,* 10 F.3d 123, 133 (3d Cir. 1993). Thus, in this case, where the City of Erie relied upon this Court's decision in *Barnes* and the State of Indiana's experience, the second prong of *O'Brien* is met.

A second justification for the furtherance of a governmental interest in this case rests on the moral judgment of the City of Erie's elected representatives that nude dancing is not morally acceptable. The record below illustrates that many of the City Council members considered the issue of regulating nude dancing a moral issue, and they voted in favor of the ordinance to protect the morals of the citizens of Erie. This moral judgment is a valid governmental interest because as the Chief Justice wrote in *Barnes,* " . . . public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the

authority to provide for the public health, safety, and morals. . . . " *Barnes* at 569.[5] Therefore, the ordinance at issue in this case is well within the Court's prior decisions and is a constitutional exercise of the state's police power.

Third, the *O'Brien* test requires that the government interest be unrelated to the suppression of free expression. In this case, as it was in *Barnes,* the ordinance seeks to regulate public nudity, not dance. Thus, as Chief Justice Rehnquist found in *Barnes,* the ban on public nudity is unrelated to the freedom of expression because the perceived evil is public nudity, whether or not it is combined with expressive activity. *Barnes* at 570-71. Because the Erie ordinance is almost identical to the one at issue in *Barnes,* it too must be unrelated to the suppression of expression.

Finally, the restriction must be the least restrictive means to further the governmental interest. In this case, the governmental interest is to prevent public nudity, and the statute clearly covers the bare minimum necessary to further that governmental interest. The statute only requires that the dancer's wear pasties and G-strings, the most minimal clothing imaginable that still covers the parts of the relevant parts of human anatomy. In this case then, the final prong of *O'Brien* is met because the

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[5] Chief Justice Rehnquist went on to note that the Court has upheld regulation based on protection of societal moral concerns in *Bowers v. Hardwick,* 478 U.S. 186 (1986), *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), and *Roth v. United States,* 354 U.S. 476 (1957).

restrictions on expression, if any at all, are the minimal amount necessary to further the governmental interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The judgment of the Pennsylvania Supreme Court should be reversed.

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No. 98-1161

Supreme Court, U.S.
FILED
AUG 4 1999
CLERK

IN THE

Supreme Court of the United States

CITY OF ERIE, PA., *et al.*,

Petitioners,

—v.—

PAP'S A.M.,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF MORALITY IN MEDIA, INC. NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Morality in Media, Inc. ("MIM"), the National Law Center for Children and Families, Inc. ("NLC"), and the Family Research Council ("FRC") as *Amici Curiae*, file this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the Petitioners and Respondent have been requested and all parties have consented thereto in writing. Copies of the written consents are being filed concurrently with this brief.

MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. It's Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link, produced the "Hill-Link Minority Report" of the Commission, which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 at 58, notes 7 and 8 (1973). More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 116 S.Ct. 2374 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment For The Arts v. Finley*, 524 U.S. 569 (1998).

NLC is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including; *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (prison pornography regulations); *Free Speech Coalition v. Reno*, N.D. Cal. 1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536 (argued Mar. 10, 1998) (computerized child pornography, 18 U.S.C. 2252A); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996) (Communications Decency Act, "CDA"); *City of National City v. Wiener*, 838 P.2d 223 (Cal. 1992) (sexually oriented business zoning); and *State v. Harrold*, 593 N.W.2d 299 (Neb. 1999) (obscene act on public access cable TV). NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography);

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

FRC is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens. FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. The expertise of the FRC has been of particular importance to members of the United States Congress. Sen. Dan Coats, (*R-IN*) recently recognized the assistance that the FRC has provided for his staff, "[Y]ou've done marvelous work here defining the issues for us, being such a help to our staff, and it's just been a great pleasure working with you." Sen. Rick Santorum, (*R-PA*) has also cited similar assistance from the FRC on particularly "difficult issues". Rep. Tony Hall, (*D-OH*) stated, "The Council's work is vitally important since the root of many of our nation's problems is the breakdown of the family. The family is the bedrock of society and I salute FRC for its efforts to strengthen it." FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court and

federal courts. Charles A. Donovan is the Executive Vice President and acting C.E.O. Janet M. LaRue is the Senior Director of Legal Studies.

Amici are filing this brief in support of the Petitioners because they believe their brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Amici argue that the Pennsylvania Supreme Court erred in determining that the Erie public indecency ordinance is unconstitutional in violation of the First Amendment to the U.S. Constitution. *Amici* contend that disregarding *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), as the controlling Supreme Court case on point is incorrect because both the result of the majority judgment, along with the controlling plurality opinion, are to be given precedential value. In reaching this conclusion, your *amici* maintain that the State's highest Court erred below in concluding that "no clear precedent arises out of *Barnes*" and, therefore, failing to afford precedential weight to this Court's judgment. These *amici* submit that this Court has provided guidance for the lower courts to interpret which opinion or opinions are controlling precedent in "plurality decisions".[1] Since this Court in *Barnes* upheld the Indiana public indecency statute, the State Court below should have relied on that precedent to uphold the constitutionality of the legally identical Erie ordinance, even on the narrowest grounds of any of the opinions in support of the majority judgment.

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[1] "Plurality decisions, also called no-clear-majority decisions, are those in which a majority of the Court agrees upon the judgment but not upon a single rationale to support the result." Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756, 756 (1980).

The "plurality opinion" is often referred to as the "opinion designated as the lead opinion of the Court, which is not always the opinion subscribed to by the largest number of Justices." *Id.*

ARGUMENT

I. The Majority Judgment and Plurality Opinion in *Barnes v. Glen Theatre, Inc.*, have Precedential Value that a Common Law Public Indecency Law is Constitutionally Valid.

This Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), represents the majority judgment of five Justices of this Court that Indiana's common law public indecency statute is a constitutionally valid proscription on indecent nude conduct in public places. In the primary opinion announcing the judgment of the Court, Chief Justice Rehnquist and Justices O'Connor and Kennedy held that the statute was valid and based their opinion on the substantial state interests in public morality and order and the protection of the public from indecent conduct. A fourth Justice joined in the judgment, by the concurrence of Justice Scalia, who reasoned that the statute was constitutional because such indecent nude dancing is pure conduct which is not entitled to First Amendment protection. Accordingly, moral opposition to nudity provides a rational basis that fully justifies the State's prohibition on such commercial exploitation of nudity in strip bars and other such places of public sexual exploitation. A fifth Justice joined in the judgment, by the concurrence of Justice Souter, who concluded that the well known harmful secondary effects of the sexual exploitation business is sufficient to justify prohibiting such indecent nude dancing in "adult entertainment" establishments. Both Justice Scalia and Justice Souter referred to the lead opinion as that of the "plurality" and these *amici* submit that the opinion of Justices Rehnquist, O'Connor, and Kennedy constitutes the "controlling plurality opinion" in *Barnes* and that the majority judgment of *Barnes* is the law of the case with

binding precedential value over all lower federal and state courts under our system of jurisprudence.

In a pre-enforcement civil challenge to the City of Erie's public indecency ordinance, the Court of Common Pleas enjoined its enforcement, but the Commonwealth Court reversed and upheld the constitutionality of the law in *Pap's A.M. t/d/b/a Kandyland v. The City of Erie, et al.*, 674 A.2d 338 (Pa. Commw. 1996). In reversing the Commonwealth Court, the Supreme Court of Pennsylvania held that the Erie ordinance violated the United States Constitution because it failed to pass a strict scrutiny analysis in light of that Court's determination that the ordinance was a content-based, unconstitutional restriction on speech protected by the First Amendment. *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998).[2]

In reaching this determination, the Court below erroneously concluded that no rationale in *Barnes* should be accorded precedential value because there was "no point on which a majority of the *Barnes* Court agreed".[3] Having held no governing rationale existed in the "hopelessly fragmented" *Barnes* decision, the State Court below went on to disregard the resulting majority judgment of *Barnes* which held a legally indistinguishable statute constitutionally valid under the substantial interest level of scrutiny analysis as laid out in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The Pennsylvania Supreme Court then chose to follow the minority dissent in applying a strict scrutiny analysis, which these *amici* submit is erroneous, as against the controlling majority determination that strict scrutiny is inapplicable to the type of public nudity law involved, even assuming some measure of First Amendment protection is warranted for the sake of analysis.

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[2] *Pap's A.M.*, 719 A.2d at 279-80.
[3] *Id.* at 278.

The Pennsylvania Supreme Court recognized that the statute in *Barnes* and the Erie ordinance in the instant case are "strikingly similar" or "virtually identical", in that both laws prohibit public nudity in public places while not banning all nudity or otherwise erotic dancing as such.[4]

A. Application of *Barnes* to the Facts in the Instant Case

In *Barnes*, the plurality opinion utilized the four part *O'Brien* test as a legal standard which could be applied to laws governing indecent public conduct if a speech element were found or assumed. The Court then applied this test to the Indiana public indecency law, holding the prohibition on totally nude dancing constitutional. It is clear from decisions handed down by this Court, as well as those of the Third Circuit,[5] that precedential weight has been given to *Barnes* regarding the analysis under such an intermediate level of scrutiny and for the specific majority result.[6]

[4] "The Court in *Barnes* analyzed an Indiana statute, which is strikingly similar to the Ordinance we are examining, to determine whether that statute violated the First Amendment." *Id.* at 277.

[5] United States Supreme Court cases: *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Turner Broadcasting System v. FCC*, 512 U.S. 622, (1994); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Third Circuit Court of Appeals cases: *Phillips v. Borough of Keyport*, 107 F.3d 164 (3rd Cir. 1997); *Pro v. Donatucci*, 81 F.3d 1283 (3rd Cir. 1996); *Mitchell v. Commission on Adult Entertainment Establishments of the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993).

[6] However, your *amici* disagree with the choice in some decisions to treat Justice Souter's rationale as somewhat more binding than that of the plurality's.

In *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 646 (M.D. Fla. 1994), the District Court upholding the county public nudity ordinance, requiring more covering than the Indiana statute,

Justice Souter agreed with the plurality that the *O'Brien* test is the applicable level of scrutiny and that it would be satisfied when applied, but stated, in *Barnes* at 582, his rationale that the law could be upheld on a single basis of preventing other crimes and harms:

> I nonetheless write separately to rest my concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments.

Justice Souter did not state that the law should not be upheld on the basis adopted by the plurality, but that, even if that were not part of the justification, the law should be upheld for the singular reason he embraced. According to the plurality, the governmental interest in "protecting societal order and morality" justified Indiana's proscription against total nudity in such commercial businesses.

Though Justice Scalia concurred in the judgment that upheld the Indiana statute, even assuming some expressive element may be present that would be overcome by substantial governmental interests, his opinion rejected the need for any application of First Amendment analysis, finding the law to be "a general law regulating conduct and not specifically directed at expression".[7] Under Justice

stated: "All the Court said in *Barnes*, in both the plurality opinion and in the opinion of Justice Souter, was that an anti-nudity law which is satisfied by the wearing of pasties and a G-string constituted minimal intrusion on the expressive content of dancing and was the minimum requirement necessary to achieve the state's purpose." (Emphasis added.)

[7] *Barnes* at 580.

Scalia's analysis, the law should be subject only to rational basis analysis.

Therefore, all five Justices constituting the majority agreed that the indecent exposure law as applied to public stripping was a valid, constitutional restriction of nude conduct in such public businesses. The Pennsylvania Supreme Court chose to disavow *Barnes*, affording no precedential weight to the majority judgment nor to the plurality opinion or to either of the separate concurrences by Justices Souter or Scalia. *Amici* maintain that the State's interests are substantial enough to justify the minimal restrictions on whatever minimal expressive element was alleged by the dancers or their employers, if any exists or is assumed *arguendo*.

B. The Test Used by the Pennsylvania Supreme Court to Determine Precedential Value in Plurality Decisions

The Pennsylvania Supreme Court in holding no rationale of the *Barnes* majority governed its decision, disregarded this Court's prior instructions relative to interpreting plurality decisions, finding intermediate level of scrutiny not applicable, but rather strict scrutiny to be the standard of review. In reaching this conclusion the Court below applied the following test which can be found at 719 A.2d at 278:

> .... a majority of the Court must be in agreement on the concept which is to be deemed the holding. It is certainly permissible to find that a Justice's opinion which stands for the "narrowest grounds" is precedential, but only where those "narrowest grounds" are a sub-set of ideas expressed by a majority of other members of the Court. The mere finding that one Justice expressed a narrower belief than others does not dispense with the requirement that a majority of the Court need agree on a concept before that concept can be treated as binding precedent. (Emphasis added.)

Amici submit that this requirement of a "majority concept" is erroneous in these circumstances, noting that the Court below provided no authority for this proposition.

Applying this novel standard, the Pennsylvania Supreme Court determined that the *Barnes* 3-1-1-(4) decision would only be binding in so far as a majority of eight Justices "agreed" that, as the Court below phrased it: "[T]he act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection."[8] The State Court then went on to hold that the governing rationale of *Barnes* is actually that of the dissent by Justice White, with whom Justices Marshall, Blackmun, and Stevens joined. The dissenting opinion found the governmental purpose behind the law to be content-based, in that it was designed "to protect viewers from what the State believes is the harmful message that nude dancing communicates".[9] The dissent then further determined that the law was unconstitutional because it would fail a strict scrutiny analysis.

Amici do not agree with the Supreme Court of Pennsylvania's requirement that "a majority of the Court need agree on a concept before that concept can be treated as binding precedent" nor that the sole precedent in *Barnes* is a finding that nude dancing is protected speech. Rather, your *amici* submit that the majority judgment that such public indecency laws are valid and that an intermediate level of scrutiny would be sufficient analysis for balancing any

[8] *Pap's A.M.*, 719 A.2d at 276.
[9] *Barnes* at 591.

arguable First Amendment concerns is the precedent that has been established in *Barnes*.

II. No Matter Which *Barnes* Rationale is Deemed to be Persuasive, the Result of *Barnes* has Precedential Effect.

Amici submit that, even if there is no "controlling" rationale, that in no way undermines the result of *Barnes* being accorded precedential value. Since five Justices have clearly agreed on the specific result and reached a majority judgment on the issue before this Court, that result should be regarded as binding on lower courts, regardless of whether any rationale can fairly be considered authoritative on its own or in conjunction with other stated reasons.

Amici further submit that it was improper for the lower Court, faced with the *Barnes* plurality decision which had garnered a majority agreement on the result, to have chosen instead to follow the dissenting rationale and to have come to a contradictory result on identical constitutional facts. *Amici* would argue that lower courts must adhere at a minimum to the principal of prior resolution in *stare decisis* which requires that any specific result, espoused by a clear majority of this Court, be controlling in substantially identical cases.[10]

Amici contend that adherence to prior determinations in similar cases is essential to the principles of certainty and uniformity underlying our system of justice. *Amici* assert that the Court below did not meet its responsibility of looking to the majority judgment, the controlling plurality, and the concurring opinions contained in *Barnes* in order to ascertain the common views of the majority of this Court to sustain the constitutionality of the Erie ordinance.

[10] 80 Colum. L. Rev. at 769-770.

Amici note that, traditionally, only the results of plurality decisions were considered authoritative.[11] *Amici* maintain that, if this Court finds no opinion of the majority of the Court to be controlling, at a minimum, the result of *Barnes* should be upheld, *i.e.* that an Indiana type law is constitutional and, therefore, the legally similar Erie ordinance also be upheld as constitutional.

III. The Plurality Opinion of Justices Rehnquist, O'Connor, and Kennedy in *Barnes* is Controlling Precedent.

In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court stated the test for determining the controlling plurality opinion in First Amendment cases:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ...." *Gregg v. Georgia*, ...

The Court of Appeals for the Sixth Circuit in *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975) was faced with reviewing a post-*Miller* trial of an obscenity offense that occurred before the decision in *Miller v. California*, 413 U.S. 15, 24-25 (1973). The Court of Appeals concluded that only the "*Miller* Test" need be provided to the jury, rather than the test formulated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Sixth Circuit was of the opinion that the *Memoirs* plurality was not binding and that *Miller* did not significantly change the law established in *Roth v. United*

[11] Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 448 (1992).

States, 354 U.S. 476 (1957).[12] This Court reversed in *Marks v. United States*, 430 U.S. at 192-93, holding that *Memoirs*, not *Roth*, stated the law of obscenity prior to *Miller*, and that the defendant was entitled to jury instructions under *Memoirs*, and to the benefits, if any, of a charge under *Miller*. In discussing the precedential value of the plurality opinion in *Memoirs*, this Court stated in *Marks*, at 193-94:

> Three Justices joined in the controlling opinion in *Memoirs*. ... The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions. *** *Memoirs* therefore was the law. *Miller* did not simply clarify *Roth*; it marked a significant departure from *Memoirs*. [Emphasis added.]

In *Marks, supra*, 430 U.S. at 193, this Court looked to *Gregg v. Georgia*, 428 U.S. 153 (1976), where the Court at that time was faced with interpreting the precedential value of *Furman v. Georgia*, 408 U.S. 238 (1972), a plurality decision, in which five Justices held the Georgia death penalty statute unconstitutional. Justices Brennan and Marshall concluded that capital punishment was unconstitutional *per se* and Justices Douglas, White, and Stewart concurred on the ground that the statutory procedures involved in the Georgia statute were unconstitutional.

After the *Furman* decision was handed down, the State rewrote its death penalty statute to comply with the narrowest holding in *Furman* and corrected its procedural requirements. Thereafter, this Court was faced with determining the constitutionality of the new law in *Gregg v.*

[12] 520 F.2d at 919-20.

Georgia, supra, and interpreted the precedential effect of *Furman* to be the narrowest rationale that the death penalty is not unconstitutional *per se* but that the Georgia statute was unconstitutional because of the procedural infirmities in that statute.[13]

Amici submit that this Court should similarly hold that the majority judgment and controlling plurality opinion of *Barnes* are binding precedent upon the Supreme Court of Pennsylvania in the instant case, as this Court in *Marks* did with the majority judgment and plurality opinion of *Memoirs*.

Examining the *Barnes* opinion should, under the *Gregg* test, eliminate the dissent as binding. Likewise, the individual opinions of Justices Scalia and Souter should also be eliminated as singularly binding, in light of the controlling plurality opinion. *Amici* would assert another ground for following the *Barnes* plurality. Rather than following only the concurring opinion of a single Justice, as stated in the first part of the *Gregg* test, the precedent should lie in the "opinion of those Justices". (Emphasis on plural supplied.) *Gregg's* reference to Justices could be more than semantic and be taken logically as meaning more than one, for the reason that the opinion of a single Justice should not set the standard of precedentiality, to the exclusion of the other Justices who join and concur in the plurality opinion or majority judgment of the Court. The future course of American jurisprudence should not be controlled by the opinion of a single Justice, who states neither the majority judgment nor the plurality opinion of the Court.

[13] This Court has generally regarded the narrowest ground as the rationale offered in support of the result that would affect or control the fewest cases in the future. *See* 80 Colum. L. Rev. 756, 764, n. 31 (1980), discussing the *Gregg* Court's treatment of *Furman*.

Amici further submit that there is a difference between a plurality decision that establishes a rule or a test, from a plurality decision that sets a general judgment that a law is valid on its face or as applied. In the first instance, the narrowest ground is important to identify in order to arrive at the test or rule of law that is only as broad as necessary to decide the matter. In the second instance, if the law is valid, its constitutionality is not dependent on any one of the reasons given, but is valid for any or all of the reasons given in support of the general judgment.

In the present case, both concepts apply. These *amici* assert that the general judgment which is binding in *Barnes* is the majority judgment that upheld a state public indecency law prohibiting the exposure of private parts in public places as facially valid and as applied to commercial nude "dancing" in bars and strip joints. Furthermore, the rule or test flowing from the controlling plurality opinion in *Barnes* is that whatever First Amendment concerns are raised by claims of expression during the act of stripping can be tested under an intermediate level of scrutiny, rather than strict scrutiny, and are met under these circumstances by the substantial governmental interests present.

In *Barnes*, at 568, the plurality accepted as constitutionally sufficient the governmental interest in protecting societal order and morality, stating: "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the State is defined as the authority to provide for the public health, safety and morals, and we have upheld such a basis for legislation."[14]

[14] *Amici* note other cases where the Supreme Court has upheld the protection of order and morality as a sufficient governmental interest. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973), where this Court stated: "In deciding *Roth*, the Court implicitly accepted that a legislature could legitimately act on such a

IV. Nude Exhibitions of Human Private Parts During Strip Shows Should Not be Declared "Protected Speech" Under the First Amendment, and this Court Should Clarify its Dicta in this Regard.

One of the major uncertainties that arises from the language in *Barnes, Schad v. Borough of Mount Ephraim*, 425 U.S. 61 (1981), and *California v. LaRue*, 409 U.S. 109 (1972), and led to the conclusion by the Supreme Court of Pennsylvania below, is the manner in which this Court has assumed for the purposes of argument that there may or might be, under some circumstances, some expressive element to strip-joint nude dancing that could constitute protected expression under the First Amendment. *See Barnes*, 501 U.S. at 565-66.

Without finding that such nude exposures of the female breasts and genital areas before a consenting audience for commercial exploitation purposes in a bar-room or juice-bar strip show is actually First Amendment protected expression, this Court has applied an *O'Brien* or *Clark*[15] test to hold that, even if such commercial nudity had some expression entitled to be treated as if it were protected speech, it would meet a substantial governmental interest test in being prohibited or restricted by such common law public indecency laws as Indiana's. This is especially so in light of the minimal limitations for "pasties and G-string" allowed by

conclusion to protect 'the social interest in order and morality'." In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), this Court clarified its position: "The law, however, is constantly based on notions of morality, and if laws representing essentially moral choices are to be invalidated under the Due Process Clause, the Courts will be very busy indeed."

[15] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

the authorities under the Indiana statute in *Barnes* and explicitly imposed by the Erie ordinance in the instant case.[16]

This Court should take this opportunity to clarify that commercial sexual exploitation of nudity in strip-bars is not itself expression protected by the Constitution as speech, even though it would be constitutional to restrict it under the substantial interest level of scrutiny test if it were.

The Pennsylvania Supreme Court found that a strict scrutiny standard was required because it found that the nude conduct was expressive speech.[17] This is an improper extension of this Court's *arguendo* assumptions that, even if it did and if the correct level of scrutiny were attached to it, whatever expressiveness might be present can be overcome by the state's substantial governmental interests in imposing limited, reasonable restrictions on the conduct involved.

This Court has had other occasions to reverse federal Constitutional misconceptions arrived at by the courts of the states. The Pennsylvania Supreme Court's erroneous conclusion in finding that "the act of dancing nude, with its attendant erotic message, is an expressive act entitled to First Amendment protection"[18] is a misapplication of the federal Constitution, in the same category as the similar conclusions corrected by this Court in some of the major First Amendment cases in the recent past, including:

New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 717 (1981):

---

[16] *See Pap's A.M.*, 719 A.2d at 276. The Erie ordinance states: "In order to avoid being in a 'state of nudity', a female person over the age of ten years of age would have to wear, at a minimum, what are commonly known as 'pasties' and a 'G-string'."

[17] *Pap's A.M.*, 719 A.2d at 276.

[18] *Id.*

> "Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment" *Id.* at 717;

New York v. Ferber, 458 U.S. 747, 752, 763, 765, 773-74 (1982):

> "We hold that §263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection." *Id.* at 765.
>
> "Because §263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth." *Id.* at 774.;

New York v. P.J. Video, Inc., 475 U.S. 868, 870, 871, 875-76 (1986):

> We think, and accordingly hold, that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." *Id.* at 875.
>
> Applying the Gates standard to the affidavits in the instant case, we think it clear beyond peradventure that the warrant was supported by probable cause to believe that the five films at issue were obscene under New York law. *Id.* at 876.;

Arcara v. Cloud Books, Inc., 478 U.S. 697, 701, 705-07 (1986):

> [W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.

Your *amici curiae* respectfully submit that this Court should clarify the misconception arrived at by the Court below and declare that the type of commercial exploitation of nudity restricted in the instant case by the Erie ordinance is pure commercial conduct that, like the prostitution in *Arcara v. Cloud Books, Inc.*, was found unintitled to Constitutional protection under such a narrowly tailored law. As stated in *Arcara*, at 705:

> [T]he sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris Adult Theatre I v. Slaton*..., we underscored the fallacy of seeking to use the First Amendment as a cloud for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

Your *amici* further submit that it is similarly fallacious to conclude that strip-joint type nude dancing is "protected speech", as a matter of law, even though it can be regulated for substantial governmental reasons, if the courts assume that it had some measure of expressive element for purposes of analysis.

Amici would submit that First Amendment values should not be invoked in the instant case by merely linking the words "dancing" and "nude." It is the nudity that customers pay pruriently to watch, not the dancing. If the "erotic" dance is the assumed expressive element, as the Court below presumed, then the pasties and a G-string will not interfere with the dance, though it could interfere with the profits of those who pander the nudity. As this Court has so often concluded, prurience is not a serious value and, in fact, pandering to prurience is the evidentiary proof that the claimed value is not serious. *Ginzburg v. United States*, 383 U.S. 463, 467-68, 475-76 (1966); *Hamling v. United States*, 418 U.S. 87, 130 (1974); *Splawn v. California*, 431 U.S. 595, 597-98 (1977); *Pinkus v. United States*, 436 U.S. 293, 303-04 (1978). In *Splawn*, at 598, this Court recognized that he who pruriently looks at pornography, like he who watches strippers bare their body parts on stage, "looks for titillation, not for saving intellectual content".

V. Conclusion

Based on the forgoing reasons, your *Amici* contend that it was error for the Pennsylvania Supreme Court to hold the Erie public indecency ordinance unconstitutional in violation of the First Amendment. Further, *amici* argue that *Barnes v. Glen Theatre, Inc.* should be afforded precedential weight as to 1) it's specific majority result, that a state public

indecency law prohibiting the exposure of private parts in public places is facially valid and as applied to commercial nude "dancing" in bars and strip joints; and 2) the plurality determination that, assuming *arguendo*, First Amendment concerns are raised by claims of expression during the act of stripping, these can be tested under an intermediate level of scrutiny and are met under these circumstances by the substantial governmental interests present.

Your *amici curiae* therefore pray that this Honorable Court will reverse the judgment below of the Supreme Court of Pennsylvania.

Respectfully submitted,

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FILED
AUG 13 1999
OFFICE OF THE CLERK

(8)

No. 98-1161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CITY OF ERIE,

Petitioner,

-v.-

PAP'S A.M.

Respondent.

ON WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPREME COURT

BRIEF OF *AMICUS CURIAE* NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE CITY OF ERIE

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QUESTION PRESENTED

In *Barnes v. Glen Theatre*, this Court upheld Indiana's public indecency statute as applied to nude dancing in sexually oriented businesses. In a plurality decision, a majority of justices agreed that the statute's purpose was not the suppression of free expression. The City of Erie adopted an ordinance patterned after the Indiana statute. Pap's, a sexually oriented business seeking to offer nude dancing, alleges that the ordinance violates its free speech rights. Does *Barnes* govern?

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CONSENT OF THE PARTIES

Attorneys for Petitioner and Respondent have consented to the filing of an amicus curiae brief by National Family Legal Foundation. Copies of the written consents appear in Appendix A.

INTEREST OF THE *AMICUS CURIAE*[1]

National Family Legal Foundation (NFLF) is a nonprofit organization founded in 1990 to provide resources and legal counsel to help communities take effective, constitutional action against the harmful secondary effects of sexually oriented businesses. In serving the public interest, NFLF attorneys draft, review, and provide expert testimony on legislation at all levels of government.

NFLF advocates ordinances that help communities prevent the crime and public health problems that flow from

[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amicus curiae* National Family Legal Foundation discloses that he authored this brief in whole. Partial funding for the preparation and submission of this brief was provided by Alliance Defense Fund, Scottsdale, AZ.

sexually oriented businesses. Public nudity in sexually oriented businesses contributes to these harms. As Justice Rehnquist explained in *California v. LaRue*, "prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises." 409 U.S. 109, 111 (1972). Unfortunately, the problems communities face with sexually oriented businesses are not a thing of the past. *See, e.g. DCR, Inc. v. Pierce County*, 92 Wash. App. 660 (1998) (documenting prostitution, narcotics transactions, and customers orally contacting dancers' genitalia). The spread of disease and threats to public health that attend public nude conduct are an ongoing concern for the local governments NFLF serves. The prohibition of public nudity in sexually oriented businesses furthers the government interest in preventing these harms. *Barnes v. Glen Theatre*, 501 U.S. 560, 584 (Souter, J., concurring).

NFLF contends that the time, place, and manner doctrine applied in *Barnes* has an important place in First Amendment jurisprudence. The doctrine allows governments to further their interests in protecting communities while allowing sometimes disfavored messages, including eroticism, to be conveyed. Absent this doctrine, the First Amendment would become meaningless, for persons engaging in a variety of illegal conduct would claim that they intended thereby to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376. Such a result would make a mockery of our constitutional system.

NFLF urges this Court to reverse the court below because its conclusion undermines not only the well-being of our communities, but also the last thirty years of this Court's First Amendment jurisprudence.

SUMMARY OF THE ARGUMENT

In *Barnes v. Glen Theatre*, this Court upheld Indiana's public indecency statute as applied to nude dancing in sexually oriented businesses. In a plurality decision, a majority of Justices agreed that the statute's purpose was not the suppression of free expression and that the State's goal of protecting societal order and morality was a valid support for the law. Justice Souter, in his concurrence, recognized morality as a valid support for the law but required the State's proffered goal of preventing the negative secondary effects of nude dancing in order to uphold the regulation. Hence, under *United States v. Marks*, Justice Souter's position provided the "narrowest grounds" supporting the judgment, and became the holding of the case.

Three years after *Barnes*, the City of Erie adopted an ordinance substantively identical to the Indiana statute. In reviewing the ordinance, the Pennsylvania Supreme Court concluded that *Barnes* was "hopelessly fragmented" and offered no "binding precedent" that lower courts must follow.

The court then adopted positions rejected by this Court in *Barnes* and invalidated the Erie ordinance as applied to nude dancing in sexually oriented businesses. Because the Pennsylvania Supreme Court misapplied the *Marks* rule to circumvent this Court's binding precedent on a federal constitutional question, this Court should reverse.

ARGUMENT

I. THE LOWER COURT'S MISAPPLICATION OF THE *MARKS* RULE CIRCUMVENTS *BARNES* AND UNDERMINES OUR JUDICIAL STRUCTURE.

A. The *Barnes* Court held that Indiana's prohibition of public nudity is a valid regulation of conduct and that its incidental limitations on expression are justified by the government's interest in preventing the negative secondary effects that attend public nude conduct.

The lower court described this Court's decision in *Barnes v. Glen Theatre*[1] as "hopelessly fragmented,"[2] "non-harmonious,"[3] and a "hodgepodge,"[4] from which it was impossible to glean a holding. Thus it concluded, "[A]lthough we may find that the opinions expressed by the Justices prove instructive, no clear precedent arises out of Barnes..."[5] The lower court's problems with *Barnes*, however, are common to all true plurality opinions and reflect not a lack of understanding of how to handle the Erie

[1] *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) (plurality opinion)
[2] *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277 (Pa. 1998).
[3] *Id.*
[4] *Id.* at 278.

ordinance, but rather a lack of willingness to follow binding Supreme Court precedent with which they simply disagreed.[6] A review of the *Barnes* decision demonstrates that the Erie ordinance is a constitutional time, place, and manner regulation of expressive conduct.

The *Barnes* decision produced three opinions agreeing on the judgment: the plurality opinion authored by Chief Justice Rehnquist, in which Justices Kennedy and O'Connor joined, a concurring opinion filed by Justice Scalia, and a concurrence filed by Justice Souter. Each of the Justices supporting the judgment agreed that the Indiana statute could not be characterized as relating to the suppression of free expression, and that protection of societal order and morality is a valid government interest furthered by the law.

Justice Scalia took the broadest view, stating that as a general regulation of conduct, the statute did not implicate the First Amendment and therefore any rational basis would

[5] *Id.*
[6] *Id.* at 279 (opining instead that Justice White's dissenting opinion in *Barnes* was "directly applicable to the situation before us now...").

justify its application to the conduct at issue.[7] The plurality took a narrower view, opining that because the statute had an incidental impact on expressive conduct, the law was justified not by "any rational basis," but by the important government interest of protecting societal order and morality from the "gross and open indecency" of persons indiscriminately exposing their genitals in public places.[8] Justice Souter's position took an even narrower view, resting his concurrence in the judgment "not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments of the sort typified by respondents' establishments."[9]

Each of the opinions agreed that the prohibition of public nudity was a regulation of conduct that could not be characterized as relating to the suppression of free expression. Justice Scalia noted that "On its face, this law is

[7] *Barnes*, 501 U.S. at 572 (Scalia, J., concurring).
[8] *Id.* at 568 (plurality opinion) (citing *Winters v. New York*, 33 U.S. 507 (1948))
[9] *Id.* at 582 (Souter, J., concurring).

not directed as expression in particular..."[10] The plurality echoed this conclusion when discussing the government's interest in protecting societal morality: "This interest is unrelated to the suppression of free expression."[11] And Justice Souter concurred, stating that "[T]he governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression."[12] The agreement of the *Barnes* Court on this point alone precludes the lower court's conclusion that a public nudity law is a content-based restriction on speech deserving strict scrutiny.[13] For as the Third Circuit has explained, lower court courts "are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test."[14] Justice Castille, concurring below on

[10] *Id.* at 572 (Scalia, J., concurring).
[11] *Id.* at 570 (plurality opinion).
[12] *Id.* at 585 (Souter, J., concurring).
[13] *Pap's*, 719 A.2d at 279.
[14] *Planned Parenthood v. Casey*, 947 F.2d 682, 694 (3rd Cir. 1991), *aff'd in part and rev'd in part*, 112 S.Ct. 2791 (1992).

state law grounds, recognized this obvious principle and exposed the error of the *Pap's* majority.[15]

Moreover, the five Justices agreed that protecting morality was a valid reason for the law. For Justice Scalia, morality supplied the rational basis for the law.[16] For the plurality, protecting morality was the substantial interest required under *United States v. O'Brien.*[17] And Justice Souter, while not agreeing that the interest in morality alone was *sufficient* to justify the law, agreed that protecting morality was a valid reason favoring its justification: "While it is certainly sound in such circumstances to infer general purposes "of protecting societal order and morality ... from [the statute's] text and history, I think that we need not so limit ourselves in identifying the justification for the legislation at issue..."[18] In sum, despite Pap's

[15] *Pap's*, 719 A.2d at 282 (Castille, J., concurring) ("[F]ive Justices, and thus a majority, voted to uphold the ordinance in Barnes on the basis that the ordinance at issue in Barnes could not be characterized as relating to the suppression of free expression for purposes of the First Amendment. Therefore, a five-Justice majority declined to apply the strict scrutiny test.")
[16] *Barnes*, 501 U.S. at 580 (Scalia, J., concurring)
[17] *Id.* at 569 (plurality opinion) (following *United States v. O'Brien*, 391 U.S. 367 (1968)).
[18] *Id.* at 582 (Souter, J., concurring).

characterization that moral motivations of the Erie City Council taint the constitutionality of the ordinance,[19] and Justice Castille's opinion of the same,[20] the protection of societal order and morality has empirically been a strong support for laws regulating public conduct.[21]

Despite the agreement of the majority of Justices on these two important points, the lower court incorrectly concluded that apart from the issue of the applicability of the First Amendment to the expressive conduct of nude dancing, there was "no point on which a majority of the Barnes Court agreed."[22] This conclusion stemmed from the court's improper focus on areas of divergence among the opinions supporting the judgment; it is clearly erroneous and should be reversed.

All five Justices agreed upon the major premise that the Indiana statute was directed at conduct, not expression.

[19] Trial Brief for Plaintiff at 2, *Pap's A.M. v. City of Erie*, Court of Common Pleas of Erie County, No. 1994-60059.
[20] *Pap's*, 719 A.2d at 284 (Castille, J., concurring)
[21] *See, e.g., Le Roy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K. B. 1664) (considering public nudity an act *malum in se*); *Ardery v. State*, 56 Ind. 328 (1877).
[22] *Pap's*, 719 A.2d at 278.

They differed as to the minor premise, i.e., the impact of this finding. Justice Scalia concluded that such a finding meant that the law did not implicate the First Amendment at all.[23] The plurality concluded the First Amendment was implicated because Indiana's regulation of conduct had incidental limitations on expressive activity, but that the State's interest in protecting societal order and morality jjustified those incidental limitations.[24] Justice Souter agreed with the plurality as to the applicability of the First Amendment, but wrote separately to concur in the judgment based upon the State's substantial justification in preventing the documented, negative secondary effects of nude dance establishments.[25]

Justice Souter's holding that prevention of negative secondary effects justified the regulation is a coherent subset of principles upon which five Justices agreed. The fact that four of the five did not believe that such a justification *was necessary* to uphold the law does not alter the conclusion. Three opined that something less -- a broader interest in

[23] *Barnes*, 510 U.S. at 582 (Scalia, J., concurring) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).
[24] *Id.* at 567. (plurality opinion)

societal order -- is enough to justify the statute. And one opined that because of the major premise on which all five agree, i.e., that the law is unrelated to the suppression of free expression, that the First Amendment was not involved and an even broader range of government interest -- any rational basis -- would justify the law. As the even more pronounced disagreement discussed in the *Marks* case makes clear, disagreement as to the minor premise in the syllogism does not prevent a holding from emerging from the case.

B. The *Marks* "narrowest grounds" rule was born out of *Memoirs v. Massachusetts*, a plurality opinion in which concurring justices disagreed as to the First Amendment's scope. The rule's application to this case is straightforward.

In the 1977 case of *United States v. Marks*,[26] the proper application of obscenity standards was in issue. The Court was asked to decide whether the defendant was entitled to a jury instruction based on the *Roth-Memoirs*[27] formulation of obscenity or was subject to the more

[25] *Id.* at 582 (Souter, J., concurring)
[26] *United States v. Marks*, 430 U.S. 188 (1977).
[27] *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion).

expansive *Miller*[28] definition of obscenity, which was announced after the conduct giving rise to Marks' prosecution occurred but before he went to trial. The substantive difference was that under the *Roth-Memoirs* formulation, the prosecution would have had to prove that the material in issue was "utterly without redeeming social value."[29] Under *Miller*, the prosecution needed only show that the material "taken as a whole lacks serious literary, artistic, political or scientific value."[30]

The District Court gave an instruction based upon the newer, easier-to-prosecute *Miller* standards, and the Sixth Circuit Court of Appeals affirmed,[31] noting that the *Roth-Memoirs* definition had never been approved by a plurality of more than three Justices at any one time.[32] Apparently, the

[28] *Miller v. California*, 413 U.S. 15 (1973).
[29] *Roth*, 354 U.S. at 489; *Memoirs*, 383 U.S. at 419 ("A book cannot be proscribed unless it is found to be *utterly* without redeeming social value.")
[30] *Miller*, 413 U.S. at 24.
[31] *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975).
[32] *Id.* at 919, 920.

Sixth Circuit concluded from this fact that the *Memoirs* standard never became the law.[33]

This Court granted certiorari. In answering the question of which jury instruction Marks should have been given, the Court analyzed the precedential value of *Memoirs v. Massachusetts*,[34] a case stemming from a decision of the Massachusetts Supreme Judicial Court. The state high court had held that a book need *not* be "unqualifiedly worthless before it be deemed obscene."[35] This Court granted certiorari and six Justices voted to reverse the Massachusetts Supreme Judicial Court's decision. Three Justices rested the reversal on the ground that the lower court misinterpreted the social value criterion of the federal constitutional definition of obscenity.[36] One Justice concurred on the ground that only "hard-core pornography" may be suppressed, and that the book in question was did not qualify as "hard-core

[33] *Marks*, 430 U.S. at 192.
[34] *Id.* at 193-94.
[35] *Memoirs v. Massachusetts*, 206 N.E. 2d 403 (Mass. 1965).
[36] *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (Brennan, J., concurring, joined by Warren, C.J., and Fortas, J.).

pornography."[37] And two Justices concurred on different grounds -- that the First Amendment protects even obscene speech.[38]

In deciding the precedential value of the *Memoirs* decision, this Court in *Marks* explained:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds...."[39]

Even sharp disagreement among the Justices concerning the applicability of the First Amendment does not diminish the binding nature of the narrowest position supporting the judgment. It is the law:

> Three Justices joined in the controlling opinion in Memoirs. Two others, Mr. Justice Black and Mr. Justice Douglas, *concurred on broader grounds* in reversing the judgment below. 383 U.S., at 421, 424. They reiterated their well-known position that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity.... The view of the Memoirs plurality therefore constituted the

[37] *Id.* at 421.
[38] *Id.* at 421 (Black, J. concurring); *Id.* at 424 (Douglas, J., concurring).
[39] *Marks*, 430 U.S. 188, 193 (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)

> holding of the court and provided the governing standards.... Memoirs therefore was the law.[40]

Instead of characterizing Justices Black and Douglas as taking a "radically different route"[41] to support the judgment in *Memoirs*, the Court in *Marks* simply states that the two "concurred on broader grounds." Certainly the *Marks* Court would have characterized Justice Scalia's concurrence in *Barnes* as a concurrence on the broader grounds that not only secondary effects, but any rational basis would support the Indiana statute. Though his position is not the law, the lower court was bound to "count" Justice Scalia's vote in favor of the narrower position that Justice Souter took in requiring a secondary effects justification. And just as the Sixth Circuit in *Marks* was bound to follow this Court's interpretation of a federal constitutional principle in *Memoirs*, so the Pennsylvania Supreme Court was bound to follow this Court's decision in *Barnes* that a public indecency statute could be constitutionally applied to

[40] *Id.* at 194.
[41] *Pap's*, 719 A.2d at 277.

completely nude dancing in sexually oriented businesses. The lower court openly refused to do so, and should be reversed.

C. The *Marks* rule is jurisprudentially sound because it limits the reach of plurality decisions while ensuring that the law emerging from those opinions is followed by lower courts.

The *Marks* rule is designed to serve two important functions: (1) to limit the reach of plurality opinions by ensuring that only the narrowest grounds supporting the judgment become the law, and (2) to ensure that lower courts follow that law by providing a methodology for discerning the Court's holding.[42] Lower courts must follow the binding precedents of higher courts, or the courts themselves will lose credibility and be incrementally stripped of their ability to preserve constitutional freedoms. The case sub judice reflects a direct assault on the Supreme Court as the institution that is tasked with authoritatively applying and interpreting the Constitution.

[42] Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 421 (1992).

The Pennsylvania Supreme Court rejected the *Barnes* decision as binding precedent not because Justice Souter's failed to provide the narrowest grounds for the judgment, but rather because, in their view, "The fifth vote for Justice Souter's position is not forthcoming. It cannot be provided by Justice Scalia, who believed that restrictions on dancing are not to be analyzed pursuant to the First Amendment."[43]

The lower court misunderstands the *Marks* rule. *Marks* does not require that the narrowest grounds receive five votes in its favor. If it did, the second, third, and fourth votes for Justice Souter's position would also not be forthcoming, as the Chief Justice, Justice Kennedy, and Justice O'Connor did not agree that a secondary effects justification was necessary to uphold the content-neutral statute in *Barnes*. In fact, the lower court fails to recognize even the agreement between Justice Souter and the plurality, but instead states, "Even if we were to assume arguendo that [Justice Souter's] concurring opinion provided an approach which was "narrower" than, and yet still encompassed by and

[43] *Pap's*, 719 A.2d at 278.

consistent with, the one take by the Chief Justice, such a concession would provide only four votes for Justice Souter's position."[44] As Justice Castille correctly explained, "I believe the majority herein strains to find discord in *Barnes* where none exists,"[45] noting that even Justice Scalia did "not think the plurality's conclusions differ greatly from [his] own."[46]

Instead, the rule assumes *that no single rationale explaining the result enjoys the assent of five Justices*, and that the holding is discerned by identifying the opinion "applicable to the fewest cases, in contrast to an opinion that takes a more absolutist position or suggests more general rules."[47] As the Third Circuit has explained, the "narrowest grounds" rule will "identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional" or "that ... would invalidate

[44] *Id.*
[45] *Id.* at 282.
[46] *Barnes*, 501 U.S. at 579.
[47] Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Opinions*, 80 Colum. L. Rev. 756, 763.

the fewest laws as unconstitutional."[48] The authoritative standard in *Barnes* must of necessity be Justice Souter's concurrence, because only his rationale would produce results with which a majority of the Court would agree:

> Where no single rationale 'enjoys the assent of five Justices,' the situation becomes more complex, but the controlling principle is the same. Where a Justice or Justices concurring in the judgment in such a case articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.[49]

Justice Souter's position is the holding of *Barnes*, for fewer regulations of expressive conduct will survive scrutiny under his opinion that would regulations analyzed under the reasoning adopted by the plurality or Justice Scalia. And in those cases, the narrower scrutiny of Justice Souter will produce results with which a majority of the Court from *Barnes* would agree.

Essentially the lower court posits that it is not bound by *Barnes* when interpreting this federal constitutional

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[48] *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 694 (3rd Cir. 1991), *aff'd in part and rev'd in part*, 112 S.Ct. 2791 (1992).
[49] *Id.* at 693.

principle because it is a plurality decision, which by definition includes disagreement among the various members controlling the judgment of the court. And instead of adopting any one of the three opinions supporting the judgment, the lower court decided to adopt the reasoning expressly rejected by this Court in *Barnes*.

D. Lower courts have consistently and correctly used the *Marks* rule to determine the *Barnes* holding, thereby providing predictability in the law. The "striking similarity" of the Erie ordinance to the law in *Barnes* should have ended the inquiry.

Predictability in the law helps citizens to order their conduct in accord with just laws and instructs governments to abide by the limits that the Constitution places on their authority. The *Marks* rule reflects this bedrock principle guiding the function of the judiciary:

> The principal objective of this *Marks* rule is to promote predictability in the law by ensuring lower court adherence to Supreme Court precedent. This objective requires that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases and that this standard, when properly applied, produce results with which a

> majority of the Justices in the case articulating the standard would agree....[50]

A single legal standard is required to obtain predictability in the law, and since 1991, the *Marks* rule has provided that predictability in the context of public nudity laws. After stating that the plurality's views in *Memoirs* provided the governing standards for obscenity, the Court in *Marks* thought it important to observe that lower courts had consistently applied the obscenity standards of the *Memoirs* plurality: "Indeed, every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions."[51] Likewise, in the matter sub judice, the Circuit Courts of Appeal have consistently applied Justice Souter's rationale to similar laws since *Barnes* was handed down in 1991.[52]

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[50] *Planned Parenthood*, 947 F.2d at 693.
[51] *Marks*, 430 U.S. at 194.
[52] *See DiMa Corp. v. Town of Hallie*, 1999 U.S. App. LEXIS 17680, *15 (7th Cir. July 26, 1999); *Déjà Vu v. Metro Gov't (In re Tennessee Pub. Indecency Statute)*, 1999 U.S. App. LEXIS 535 (6th Cir. Jan. 13, 1999); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 408 (6th Cir. 1997); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994); *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998); *J & B Entertainment v. City of Jackson*, 152 F.3d 362, 370 (5th Cir. 1998); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (1991).

In *Triplett Grille v. City of Akron*, upon which Pap's heavily relies, the Sixth Circuit Court of Appeals concluded that Justice Souter's concurring opinion resolved the question before the Supreme Court on the narrowest grounds.[53] The Court of Appeals specifically observed that, "As a logical consequence of their approval of morality justifications" for the regulation, the plurality "implicitly agreed with Justice Souter that governmental efforts to control the harmful secondary effects associated with adult entertainment can serve as a basis" for restricting nude dancing.[54] Justice Scalia's position did not alter their conclusion.[55] This is most likely because, as a logical consequence of his opinion that any rational basis would justify the law, Justice Scalia implicitly agreed with Justice Souter that the government's interest in preventing harmful secondary effects associated with adult entertainment can serve as a basis for restricting nude dancing. Despite the differing rationales employed by the *Barnes* court, the Sixth Circuit agreed with the district

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[53] *Triplett*, 40 F.3d at 134.
[54] *Id.*
[55] *Id.*

court that "Justice Souter's opinion may properly be regarded as providing the proper framework" for evaluating Akron's regulation of nude dancing.[56] Three years later, the Sixth Circuit again looked to *Barnes*, reiterating the binding nature of the Souter opinion as precedent:

> [W]e do not have the freedom to pick and choose which premises and conclusions we will follow, but instead, with respect to a particular issue, must follow the reasoning of the concurring opinion with the narrowest line of reasoning on that issue.[57]

The lower court's picking and choosing of which premises to follow becomes even more egregious in light of the fact that the case at bar is substantively identical to *Barnes*. The line of reasoning in *Barnes* should have proved no difficulty for the lower court, which conceded that the Erie ordinance was "strikingly similar"[58] to the law upheld by this Court. "It should be noted that applications of the reasoning from a prior case are necessarily by analogy; if the facts do not materially differ, the prior result would govern and the reasoning used to reach that result would be

[56] *Id.* at 135.

irrelevant."[59] Lower courts faced with challenges to laws substantively identical to the Indiana public indecency statute have properly invoked *Barnes* to end the inquiry.

In *SBC Enterprises, Inc. v. South Burlington*, the federal district court for Vermont decided a challenge to the validity of a *Barnes*-type ordinance passed by the City of South Burlington. The court concluded that determining the constitutionality of the law was a simple task, holding that:

> Under Justice Souter's approach, the Ordinance is valid. Indeed, this Court need not engage in an analysis of the Ordinance beyond reference to Justice Souter's opinion. Because the regulations in the instant case and in Barnes are identical, there is little to add that would explain further why the Ordinance is valid. If anything, this case presents a regulation that is easier to uphold than that in Barnes, since the Resolution passed by the City Council indicates that it considered secondary effects.[60]

More recently, in *Farkas v. Miller*, the Eighth Circuit Court of Appeals reviewed an Iowa statute which required erotic dancers to wear G-strings and pasties during their

[57] *DLS*, 107 F.3d at 409.
[58] *Pap's*, 719 A.2d at 277.
[59] Thurmon, *When the Court Divides*, 42 Duke L.J. at 436.

performances.[61] Citing *Marks*, the Eighth Circuit concluded that Justice Souter presented the narrowest resolution of the issues in *Barnes*.[62] The threshold issue for the plaintiffs then, was whether their case could be distinguished from *Barnes*:

> The plaintiffs advance numerous arguments that seek to refute Justice Souter's reasoning and conclusions. Regardless of their strength or weakness, these arguments are unavailing, because we are not free to disregard Supreme Court precedent. We must apply the Barnes analysis as expounded by Justice Souter unless we find that this case is somehow distinguishable.[63]

The Eighth Circuit found that Iowa statute was not distinguishable from the law upheld in *Barnes* and disposed of the plaintiffs' arguments.[64] The court below should have done the same.

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[60] *SBC Enterprises v. City of South Burlington*, 892 F.Supp. 578 (D. Vt. 1995).
[61] *Farkas*, 151 F.3d 900
[62] *Id.* at 904.
[63] *Id.*
[64] *Id.* at 906.

CONCLUSION

The lower court defied binding Supreme Court precedent on a federal constitutional principle and should therefore be REVERSED.

Dated: August 12, 1999

Respectfully submitted,

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APPENDIX A

National Family Legal Foundation.

Protecting Children and their Neighborhoods

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Wednesday, June 16, 1999

Gregory Karle
Solicitor
City of Erie
626 State St., Room 505
Erie, PA 16501

Re: Pap's A.M. v. City of Erie, No. 98-1161

Dear Mr. Karle:

I serve as General Counsel for National Family Legal Foundation, a nonprofit legal organization which has assisted hundreds of municipalities in the drafting and defense of ordinances regulating sexually oriented businesses. We desire to file an amicus curiae brief in support of the City of Erie in the above-styled case. Pursuant to Rule 36 of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Airborne Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Scott D. Bergthold

Scott D. Bergthold
General Counsel

Enclosures

I do __X__ do not ____ consent to the filing of an amicus curiae brief by National Family Legal Foundation in Pap's A.M. v. City of Erie, No. 98-1161.

_____ / Date 6-21-99
Gregory Karle
Solicitor, City of Erie

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Monday, June 28, 1999

Philip B. Friedman, Esquire
319 W. 8th St.
Erie, PA 16502

Re: Pap's A.M. v. City of Erie, No. 98-1161

Dear Mr. Friedman,

I serve as General Counsel for the National Family Legal Foundation. We desire to file an amicus curiae brief in support of the City of Erie in the above-styled case. Pursuant to Rule 37 of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Airborne Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Scott D. Bergthold

Scott D. Bergthold
General Counsel

Enclosures

I do ✓ do not ___ consent to the filing of an amicus curiae brief by National Family Legal Foundation in Pap's A.M. v. City of Erie, No. 98-1161.

Date 6/29/99

Philip B. Friedman
Attorney

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation in Support of the City of Erie" have been sent via common carrier for delivery on Friday, August 13, on this 12th day of August, 1999 to the following:

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Supreme Court, U.S.
FILED
AUG 16 1999
CLERK

No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE,

Petitioner,

v.

PAP'S A.M.,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND BRIEF OF AMERICAN LIBERTIES INSTITUTE, SEMINOLE COUNTY, FLORIDA, and CALNO IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICI BRIEF

The Amici Brief of American Liberties Institute, Seminole County, Florida, and CALNO in Support of Petitioner is filed with permission of the Petitioner and a copy of the letter of consent is filed herewith. The Respondent has objected to the filing of this brief in support of the Petitioner. This Motion for Leave to file this *amici curiae* brief is submitted praying for this Honorable Court's leave to file this *amici curiae* brief in support of the Petitioner.

INTEREST OF AMICI

American Liberties Institute, Seminole County, Florida, and CALNO (Council of Local Governments) file this *amici curiae* brief in support of the Petitioner to assist this Court in rendering a decision regarding the *Barnes* test. American Liberties Institute currently represents Seminole County, Florida, in litigation which presents issues that are similar to that which is pending before this Court in this case. Seminole County, Florida, and CALNO – an organization of municipal and local governments in the central Florida area – are involved in litigation which is similar to the issues pending in this case. American Liberties Institute, Seminole County, Florida, and CALNO submit this *amici curiae* brief in support of Petitioner, City of Erie, in order to safeguard the interests of Seminole County, Florida, and CALNO in their local ordinances regulating nudity and adult entertainment which are similar to the ordinance at issue in this case.

American Liberties Institute is a non-profit civil liberties education and legal defense organization created to

defend and protect constitutional liberties. American Liberties Institute's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing American Liberties Institute's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amici curiae* briefs on a variety of issues.

CONCLUSION

Amici Curiae respectfully request this Honorable Court to grant leave to file this *amici curiae* brief in support of the Petitioner.

Respectfully submitted,

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August 16, 1999

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INTEREST OF AMICI[1]

American Liberties Institute, Seminole County, Florida, and CALNO (Council of Local Governments) file this *amici curiae* brief in support of the Petitioner to assist this Court in rendering a decision regarding the *Barnes* test. American Liberties Institute currently represents Seminole County, Florida, in litigation which presents issues that are similar to that which is pending before this Court in this case. Seminole County, Florida, and CALNO – an organization of municipal and local governments in the central Florida area – are involved in litigation which is similar to the issues pending in this case. American Liberties Institute, Seminole County, Florida, and CALNO submit this *amici curiae* brief in support of Petitioner, City of Erie, in order to safeguard the interests of Seminole County, Florida, and CALNO in their local ordinances regulating nudity and adult entertainment which are similar to the ordinance at issue in this case.

American Liberties Institute is a non-profit civil liberties education and legal defense organization created to defend and protect constitutional liberties. American Liberties Institute's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms. As part of advancing American Liberties Institute's purpose, education is provided through interaction with attorneys and members of the

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[1] This brief is authored solely by counsel for *Amici Curiae*. This brief is filed with permission of the Petitioner and a copy of the letter of consent is filed herewith. The Respondent has objected to the filing of this brief in support of the Petitioner. A Motion requesting leave to file this brief is submitted herewith.

academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amici curiae* briefs on a variety of issues.

SUMMARY OF THE ARGUMENT

The Supreme Court of Pennsylvania erred in *Pap's A.M. v. City of Erie* when the court failed to recognize this Court's decision in *Barnes v. Glen Theatre, Inc.*, as binding precedent. This Court's decision in *Barnes* is "good law" in that it satisfied the requirements of the *United States v. O'Brien* test. Based on *O'Brien*, five justices in *Barnes* agreed that the Indiana statute was content neutral, therefore, strict scrutiny did *not* apply. The City of Erie's ordinance was substantially similar to Indiana's statute reviewed in *Barnes*. The Supreme Court of Pennsylvania in *Pap's* erred because it found the City of Erie's ordinance content-based and applied strict scrutiny. In doing this, the Supreme Court of Pennsylvania adopted the position of the dissent in *Barnes* in direct contravention of this Court. Accordingly, the Supreme Court of Pennsylvania should be reversed.

As a subset of the plurality opinion in *Barnes*, Justice Souter's concurring opinion is the standard by which courts should look in analyzing similar public indecency or adult entertainment regulations. Justice Souter's concurring opinion is the opinion decided on the narrowest of grounds and is the "holding" of this Court. The Supreme Court of Pennsylvania committed reversible error and, therefore, should be reversed.

ARGUMENT

I.

THE SUPREME COURT OF PENNSYLVANIA ERRED WHEN IT ABANDONED BINDING UNITED STATES SUPREME COURT PRECEDENT IN *BARNES V. GLEN THEATRE, INC.*, IN FAVOR OF ITS OWN ANALYSIS.

A. Applicable Constitutional Standards

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In 1925, this Court extended the First Amendment's protection by binding the states through the application of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Whether the speech is under the purview of the First Amendment and what is the scope of that protection are questions that have plagued First Amendment jurisprudence for many years. The fundamental inquiry is whether the "speech" is entitled to protection at all. This Court has held that certain forms of expressive conduct, as well as the spoken word, have the potential to communicate ideas and, therefore, deserve First Amendment protection. *Texas v. Johnson*, 491 U.S. 397, 405-406 (1989).

In fact, expressive conduct such as flag burning, *United States v. Eichman*, 496 U.S. 310, 315 (1990), peace symbols attached to flags, *Spence v. Washington*, 418 U.S. 405, 409-410 (1974), the wearing of black arm bands as a protest to war, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505 (1969), public sit-ins protesting racial segregation, *Brown v. Louisiana*, 383 U.S. 131, 142 (1966), picketing by striking union members, *Thornhill v.*

Alabama, 310 U.S. 88 (1940), and displaying of a red flag, *Stromberg v. California*, 283 U.S. 359, 368 (1931), are all under the First Amendment's protection. Conduct is left unprotected if it is deemed non-expressive. *See South Florida Beaches, Inc. v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984).

In addition to the above expressive conduct, this Court has recognized that live non-obscene sexual performances are entitled to some form of First Amendment protection. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *California v. LaRue*, 409 U.S. 109, 118 (1972). This Court, however, never directly addressed the exact level of First Amendment protection afforded to adult entertainment.

To ascertain how much protection "speech" is entitled to, this Court analyzes an ordinance challenge by first determining the purpose of the regulation. *See Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). If the regulation's purpose is the silencing or singling out of constitutionally protected speech because the speaker's message carries an unwanted communicative impact, the regulation must pass strict scrutiny. *See Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). This type of regulation, known as a content-based regulation, is upheld if the regulation is necessary to serve a compelling state interest and is narrowly tailored to serve that interest. *Id.* at 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455 (1980)). If, however, the regulation's purpose focuses on reasons detached from the speech's content, the government has more liberty in regulating the speech. *See Mosley*, 408 U.S. at 95-96. This type of

regulation, one that only touches upon the speech's time, place or manner, is considered content-neutral. A valid content-neutral regulation is: (1) unrelated to the suppression of ideas; (2) narrowly tailored to serve a significant governmental interest; and (3) leaves open adequate alternative avenues of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-16 (1981); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Traditionally, the time, place, and manner test was framed to apply only to speech or expressive conduct that took place in public forums. *See Ward*, 491 U.S. at 791. This Court, however, has applied the time, place, and manner test in a number of cases involving the regulation of private adult entertainment establishments. In *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), the City of Detroit amended its "Anti-Skid Row Ordinance" to impose zoning limitations on adult businesses by prohibiting them from being located within 1,000 feet of any two existing adult businesses or within 500 feet of any residential area. *Id* at 52-54. The City of Detroit argued that adult entertainment establishments had a "deleterious effect on the adjacent areas" and could "contribute to the blighting or downgrading of the surrounding neighborhood" when condensed into a confined area. *Id.* at 54 n.6. After noting that the ordinance treated adult theaters differently, this Court stated that the ordinance constituted an acceptable content-neutral time, place, and manner

regulation because the ordinance's purpose was not to stifle protected speech but was to curb the secondary effects which the adult businesses had on surrounding uses. *Id.* at 62-63, 71 n.34. Justice Stevens noted that "the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *Id.* at 71-73 (Steven, J. concurring).

Five years later, this Court again applied the time, place, and manner test to the issue of nude dancing in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). There, operators of an adult bookstore featuring nude dancing were convicted of violating a zoning ordinance that banned all adult theaters from commercial zones. *Id.* at 63-64. The ordinance was deemed unconstitutional because the government failed to present evidence of a substantial governmental interest and of available alternative avenues of communication. *Id.* at 73-74. The *Young* holding was deemed not controlling because in that case "[t]he restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them." *Id.* at 71.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43 (1986), this Court upheld a zoning ordinance that restricted the location of adult motion picture theaters. Although this Court recognized the regulation's burden on speech as a result of a content-based distinction, it upheld the ordinance as a proper time, place, and manner regulation nonetheless because it did not ban adult theaters altogether. *Id.* at 47, 52-54. This Court noted that in addition to alternative areas of the city open for the protected communication, the zoning ordinance was aimed at eradicating the secondary effects caused by the presence of

adult theaters, not the communication of "offensive" speech and was, therefore, constitutional. *Id.* at 54.

Aside from the time, place, and manner test described above, this Court has enunciated a slightly different test for determining the validity of content-neutral regulations on symbolic speech. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). This Court, however, has viewed the *O'Brien* "symbolic speech" test and the time, place, and manner test as essentially the same. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). In *O'Brien*, the defendant burned his draft card in protest of the Vietnam War and was consequently convicted of violating a federal law forbidding the destruction of draft cards. O'Brien challenged his conviction on the basis that the law unconstitutionally abridged his freedom of speech. Presuming that the First Amendment protected the communicative component of O'Brien's conduct, this Court wrote:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.
>
> . . .
>
> [W]e think it clear that a government regulation is sufficiently justified if the governmental regulation is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no

> greater than is essential to the furtherance of that interest.

Id. at 376-77, 382.

In applying this four-prong test, the *O'Brien* Court rejected the idea that symbolic speech is entitled to the highest level of First Amendment protection and adopted an intermediate level of review. This Court refused O'Brien's First Amendment challenge, holding that Congress's purpose in forbidding draft card destruction was merely to foster an efficient administration of the draft. *Id.* at 378-82. This Court reasoned that the government's important interest in draft administration justified any incidental restriction on expression. *See id.* at 378-80.

Thus, it is clear from this Court's jurisprudence that adult entertainment, including nude dancing, is entitled to some form of First Amendment protection as expressive conduct. It is apparent, however, that public indecency and entertainment regulations will be upheld if they are content-neutral time, place, and manner restrictions.

B. This Court's Decision In *Barnes v. Glen Theatre, Inc.*, Satisfied The *O'Brien* Test And, Therefore, Is Binding Precedent.

Because this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), fulfilled the requirements of the *O'Brien* four-part test discussed above, it is binding precedent and, therefore, courts are obliged to adhere to its ruling. Thus, in content neutral ordinances regulating public indecency or adult entertainment, the *Barnes* test is applicable.

Declining to adopt the "traditional" time, place, and manner test in favor of the *O'Brien* test, this Court sought to define the scope of First Amendment protection for nude dancing subject to a public indecency statute in *Barnes*. There, two adult entertainment establishments separately brought suit in District Court seeking to enjoin an Indiana public indecency statute prohibiting nudity in all public places. The statute effectively required nude dancers to wear, at a minimum, pasties and a G-string. The District Court rejected plaintiffs' arguments in holding that the nude dancing involved was not expressive conduct. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988). The Court of Appeals reversed and concluded that "non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1084 (7th Cir. 1990). This Court granted certiorari to address the issue of whether the Indiana public indecency statute impermissibly infringed on an expressive activity protected by the First Amendment. *Barnes*, 501 U.S. at 565.

The *Barnes* Court reversed in a 5-4 decision stating that the statute was "justified despite its incidental limitations on some expressive activity." *Id.* at 567. Chief Justice Rehnquist, writing for the plurality and joined by Justices O'Connor and Kennedy, began by acknowledging that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* at 566. He noted, however, that there was still need to define the degree of protection afforded to adult entertainment. *Id.* The plurality chose to apply the

O'Brien symbolic speech test in analyzing the First Amendment issue because the "time, place, or manner" test "has been interpreted to embody much the same standards as those set forth in *United States v. O'Brien*". *Id.*

The plurality found that the Indiana public indecency statute fulfilled the first prong of the *O'Brien* test because it was "clearly within the constitutional power of the State." *Id.* at 567. The statute also met second prong of the test because it furthered a substantial governmental interest in safeguarding order and morality. *Id.* at 567-68. Chief Justice Rehnquist noted that the state's police power traditionally included the "authority to provide for public health, safety, and morals," and that regulations have been upheld for such bases. *Id.* at 568. Further, the safeguarding of order and morality was found to be "unrelated to the suppression of free expression," thus satisfying the third element, because "it was not the dancing that was prohibited, but simply its being done in the nude." *Id.* at 569. Just by "donning" pasties and a G-string, the plurality reasoned, dancers could convey their message without transgressing the statute. *Id.* at 571. Finally, this Court held that the *O'Brien* test had been satisfied with the fulfillment of the fourth prong: "It is without cavil that the public indecency statute is 'narrowly tailored;' Indiana's requirement that the dancers wear at least pasties and a G-string is modest, and the bare minimum necessary to achieve the state's purpose." *Id.* at 572.

Justice Scalia, concurring in the result, denied that nude dancing was even entitled to First Amendment

protection because the statute was a "general law regulating conduct and not specifically directed at expression." *Id.* (Scalia, J., concurring). He argued that expressive conduct restrictions should be subjected to the test in *Employment Div., Dept. Of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). *Id.* at 579. Justice Scalia stated that this Court in *Smith* "held that general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion." *Id.* Likewise, Justice Scalia stated, only regulations that are directed at protected expression should be closely scrutinized under a First Amendment analysis. *Id.* at 579-80.

Although Justice Souter agreed that adult entertainment/nude dancing was entitled to some First Amendment protection and was, therefore, subject to *O'Brien*, he disagreed with the plurality's assessment of what constituted a substantial governmental interest. *Id.* at 581-82. Justice Souter argued that Indiana was justified in regulating public indecency and thereby restricting nude dancing based on the "State's substantial interest in combating the secondary effects of adult entertainment establishments . . . " rather than "protecting societal order and morality." *Id.* at 582. Justice Souter noted that "preventing prostitution, sexual assault, and other criminal activity, . . . " clearly "falls within the constitutional power of the State," and sufficiently justifies the enforcement of the statute against adult entertainment establishments, thus satisfying the first prong of the *O'Brien* test. *Id.* at 583.

In analyzing the second prong of *O'Brien*, Justice Souter relied on this Court's decision in *Renton v. Playtime*

Theaters, Inc., 475 U.S. 41 (1986). There, this Court, concluded that Renton was not required to produce its own studies on secondary effects and upheld a zoning ordinance designed to combat the adverse effects of adult businesses. *Id.* at 51. In light of *Renton*, Justice Souter noted that "Indiana could reasonably conclude that forbidding nude entertainment . . . furthers its interest in preventing prostitution, sexual assault, and associated crimes." *Barnes*, 501 U.S. at 584.

Continuing with the *O'Brien* analysis, Justice Souter argued that the interest in combating the related secondary effects was not related to the suppression of expression, thereby fulfilling the third condition. *Id.* at 585. Again turning to *Renton*, Justice Souter noted that this Court upheld the ordinance as content neutral because the government had an interest in regulating adult entertainment establishments because their presence correlated with adverse secondary effects. *Id.* at 586. Justice Souter disagreed with the dissent's contention that the "regulation of expressive conduct because of the fear that the expression will prove persuasive is inherently related to the suppression of free expression." *Id.* at 585. Justice Souter argued that the State's interest in banning nude dancing resulted not "from a relationship between other evils and the expressive component of the dancing" but rather "from a simple correlation of such dancing with other evils," and, therefore, the interest was unrelated to suppressing expression. *Id.* at 586.

Notably, this Court has suggested that the "adverse secondary effects doctrine" may extend to other forms of speech, not just public indecency and other low value expression. Justice O'Connor, in a plurality opinion, in

Boos v. Barry, 485 U.S. 312 (1988), reasoned that content neutral regulatory laws involving "high value political speech" would be constitutional if it focused on the secondary effects of picket signs, including congestion, interference with ingress or egress, or visual clutter. Further, "visual clutter and traffic safety" are considered valid secondary effects in the content neutral regulation of commercial billboards. *See Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

Applying the last prong of the *O'Brien* test, Justice Souter in *Barnes* found that the restriction on expression was no greater than essential to further the governmental interest. *Id.* at 587. He acknowledged that pasties and a G-string might "moderate the expression to some degree," but concluded that the limitation was minimal in light of the alternative avenues the dancers had "to express the erotic message." *Id.* Accordingly, Justice Souter argued that the Indiana statute satisfied the *O'Brien* four-part test and was, therefore, constitutional.

Although Barnes may appear "splintered", when analyzed closely, it is actually a very solid decision. Eight of the Justices agreed with Indiana that public indecency and adult entertainment could be subjected to a reasonable time, place, and manner restriction. Those same eight justices, however, merely differed on what constituted a substantial governmental interest. Four Justices believed that protecting the order and morality of society was the basis for the regulation. A fifth Justice believed that suppressing the adverse effects stemming from such establishments was the basis of the regulation, also seen as a subset of "protecting societal order and morality."

The Indiana public indecency statute satisfied the *O'Brien* test under the plurality's analysis, as well Justice Souter's, and was therefore, deemed constitutional. Under both analyses, government has the authority to regulate public indecency or adult entertainment in order to protect societal order and morality and to limit the adverse secondary effects of such conduct. *O'Brien* detailed the standard for courts to follow in analyzing similar symbolic conduct regulations. Because the *Barnes* Court followed *O'Brien*, it is "good law" and is binding precedent on the courts. Thus, content neutral public indecency or adult entertainment regulations are properly analyzed under the *Barnes* test.

C. The Supreme Court Of Pennsylvania Erred By Failing To Adhere To This Court's Binding Precedent in *Barnes*.

The Supreme Court of Pennsylvania erred in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (1998), and should be reversed, because it failed to follow binding United States Supreme Court precedent. Five (5) justices in *Barnes* agreed that the Indiana statute was content neutral and, therefore, strict scrutiny did not apply. The City of Erie's ordinance was substantially similar to Indiana's public indecency statute in *Barnes*. Yet the *Pap's* court blatantly erred by finding that the Erie ordinance was content-based and thus subject to strict scrutiny. The majority of the *Pap's* court, in a great display of judicial activism, ruled that since there was "no point on which a majority of the *Barnes* Court agreed" . . . "there is [therefore] no United States Supreme Court precedent which is squarely

on point" so "we turn to our own independent examination of the Ordinance. . . . " *Id.* at 278. Instead, the Supreme Court of Pennsylvania adopted Justice White's opinion in the *Barnes'* dissent ruling the Indiana statute content-based and, therefore, subject to strict scrutiny. *Id.* at 279. In circumventing United States Supreme Court precedent, the Supreme Court of Pennsylvania has "strain[ed] to find discord in *Barnes* where none exists." *Id.* at 282 (Castille, J., concurring). The Supreme Court of Pennsylvania still found *Barnes* unsettling in spite of five Justices voting to uphold the statute as unrelated to the suppression of protected expression (content neutral) and, therefore, not subject to a strict scrutiny analysis. *Id.* at 569, 575 (Scalia, J., concurring), 586 (Souter, J., concurring). The fact that five Justices voted to uphold the statute should have been enough for the Supreme Court of Pennsylvania to adhere to this Court's decision in *Barnes*. Justice Castille chastised the majority in *Pap's A.M.* and stated that:

> [t]he majority herein overlooks this fact, deems the Barnes Court "hopelessly fragmented" and discerns no binding common ground in Barnes. Consequently, the majority adopts the position of the Barnes dissenters, finds the ordinance at issue a content-based ordinance which aimed at the suppression of protected expression and applies the strict scrutiny test. By applying the First Amendment strict scrutiny test in spite of Barnes, the majority here defies binding precedent.

Pap's A.M., 719 A.2d at 283 (Castille, J., concurring).

This Court has stated that if a precedent has direct application in a case, a lower court must not take on its

own authority to renounce precedent of this Court. *Rodriguez v. Shearson/American Exp. Inc.*, 490 U.S. 477, 484 (1989). The lower court must "follow the case which directly controls, leaving to [the United States Supreme Court] the prerogative of overruling its own decisions." *Id*. Not only was *Barnes* applicable, but it was directly on point: "The Court in *Barnes* analyzed an Indiana statute, which is strikingly similar to the ordinance we are examining." *Pap's A.M.*, 719 A.2d at 277. Even if this Court finds that its holding in *Barnes* is "hopelessly fragmented" beyond precedential value, the Supreme Court of Pennsylvania was still obligated to adhere to this Court's decision to uphold the *Barnes* ordinance.

In *D'Angio v. Borough of Nescopec*, 34 F. Supp. 2d 256 (U.S. M.D. Pa. 1999) the court found the Rehnquist plurality in *Barnes* controlling and binding precedent in the plaintiff's First Amendment challenge of Nescopec's public indecency ordinance. The proper test to apply in analyzing content neutral public indecency or adult entertainment regulations is that seen in *Barnes*. The Supreme Court of Pennsylvania in *Pap's* found fault where none existed in *Barnes* and refused to follow its holding. Therefore, the Supreme Court of Pennsylvania erred in its ruling that *Barnes* was not binding precedent and should be reversed.

D. This Court's Decision In *Barnes*, Specifically Justice Souter's Concurrence, Is Binding Precedent On The Supreme Court Of Pennsylvania.

Justice Souter's concurrence in *Barnes*, often seen as a subset of Justice Rehnquist's plurality opinion, is the

standard by which lower courts must analyze all public indecency or adult entertainment regulations. Therefore, the Supreme Court of Pennsylvania erred when it refused to recognize Justice Souter's concurrence as the "holding" in *Barnes*, and should be reversed.

This Court detailed the standard for discerning a plurality opinion when it stated that where "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

The Sixth Circuit addressed the issue of the *Barnes* holding in *Triplett Grille, Inc,. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994). In applying the *Marks* rule the Court of Appeals looked to the analysis of the District Court and concluded that Justice Souter's opinion was the standard. The District Court stated:

> Justice Scalia very broadly denies all First Amendment protection to nude dancing. The plurality dramatically expands the scope of the *O'Brien* test by allowing morality concerns to justify local legislation. Justice Souter, in contrast, bases his application of the *O'Brien* test on assumptions previously upheld in *Renton*.

Triplett Grille, Inc. v. City of Akron, 816 F. Supp. 1249, 1254 (N.D. Ohio 1993).

The court explained that Justice Souter's opinion was a "subset of the principles articulated in the plurality

opinion." That is, "as a logical consequence of their approval of morality justifications", the plurality all but agreed with Justice Souter's argument that endeavors to curb the adverse secondary effects is a valid substantial governmental interest in regulating public indecency and adult entertainment. The court cited the plurality's opinion as follows:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.

Id. (quoting *Barnes*, 501 U.S. at 569 (citations omitted)).

In *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 409 (6th Cir. 1997), the Sixth Circuit affirmed its earlier holding in *Triplett Grille, Inc.*, that Justice Souter's concurrence was the rule of law by which public indecency and adult entertainment regulations would be analyzed. It further noted that although it may be cumbersome to follow a line of reasoning that seems internally inconsistent, courts "[n]evertheless, [ ] do not have the freedom to pick and choose which premises and conclusions [they] will follow, but instead, with respect to particular issue, must follow the reasoning of the concurring opinion with the narrowest line of reasoning on that issue." *Id.* The Supreme Court of Pennsylvania, by adopting the *Barnes* dissent, "picked and chose" which holding it wished to follow.

At least four circuits, including the Fifth, Sixth, Eighth, and Eleventh circuits, have followed Justice Souter's concurring opinion for its precedential value. *See, e.g., J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998) (finding that Justice Souter's opinion in *Barnes* illustrated the narrowest solution of the issues); *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1160-61 (11th Cir. 1991) (holding that a statute regulating nude dancing will be upheld, following *Barnes*, if the statute meets the *Renton* secondary effects test), *cert. denied*, 503 U.S. 920 (1992).

Even though it may seem awkward "in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion." *Blum v. Whitco Chem. Corp.*, 888 F.2d 975, 981 (3rd Cir. 1989).

Accordingly, because Justice Souter's concurring opinion articulates the common underlying approach in analyzing public indecency or adult entertainment regulations on the "narrowest grounds", the Supreme Court of Pennsylvania erred by denouncing its precedential value and, therefore, should be reversed.

E. Preserving The Integrity Of The Judicial Process Compels This Court To Affirm Justice Souter's Opinion As Binding Precedent.

Preserving the integrity of the judicial process compels this Court to adhere to Justice Souter's opinion. The alternative is to allow lower courts to denounce binding United States Supreme Court decisions in favor of their

"own independent analysis" thereby undermining both the integrity and the authority of this Court.

This Court has stated that *stare decisis* is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has been reluctant to follow precedent just for *stare decisis'* sake in deciding constitutional issues. Nevertheless, "[e]ven in constitutional cases, the doctrine carries such a persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' " *Id.* at 842 (Souter, J., concurring) (quoting *Arizona v. Ramsey*, 467 U.S. 203, 212 (1984)). What matters most is that the "applicable rule be settled than to be settled right." *Burnet v. Coronado Oil & Gas, Co.*, 285 U.S. 293 (1932).

As discussed above, at least four circuits are applying Justice Souter's concurrence in *Barnes* to ordinances which regulate public indecency or adult entertainment. To rule that Justice Souter's opinion is not binding precedent in effect would leave many state and local government's bare, with no weapon in which to combat the negative effects of public indecency or "adult" establishments. Additionally, allowing lower courts to essentially overrule this Court's holdings presents a dangerous standard for other courts to follow in the future. In this case there is no special justification to depart from this Court's holding in *Barnes*. In fact, there is compelling justification to adhere to the *Barnes* decision and to affirm that Justice Souter's analysis is the standard under which all public

indecency or adult entertainment regulations will be scrutinized. Predictability is essential in guiding courts through the decision making process. Without it, each individual judge can determine how he/she feels like that day and make their rulings accordingly.

Because *stare decisis* is the preferred course of action, absent any compelling justification to the contrary, this Court should reverse the Pennsylvania Supreme Court's ruling in *Pap's A.M. v. City of Erie*, uphold the *Barnes* decision and affirm that Justice Souter's opinion is the "rule" to which lower courts should look in analyzing public indecency or adult entertainment regulations.

CONCLUSION

Amici Curiae respectfully requests this Court to reverse the Supreme Court of Pennsylvania's decision in *Pap s A.M. v. City of Erie* and reinstate the District Court's ruling adopting *Barnes* as binding precedent.

Respectfully submitted,

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August 16, 1999

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

(10)

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF ERIE, PENNSYLVANIA, et al.,

Petitioners,

v.

PAP'S A.M., T/D/B/A "KANDYLAND",

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* STATES OF KANSAS, OHIO, IDAHO, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI

Kansas, Ohio and 12 other *Amici* States respectfully submit this brief in support of the Petitioner in this case, the City of Erie, Pennsylvania. The specific issue is whether a local ordinance banning public nudity, a form of conduct the city sought to prohibit pursuant to general police powers, is constitutional when applied to nude barroom dancing. The issue this case presents has arisen in many States and implicates numerous State statutes and local ordinances prohibiting or regulating public nudity. Indeed, as this Court observed in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), public indecency laws "are of ancient origin and presently existing in at least 47 States." *Id.* at 568. In *Barnes*, this Court upheld a local ordinance virtually identical to the Erie ordinance as constitutional. Nonetheless, the Pennsylvania Supreme Court struck down the Erie ordinance.

The larger issue in this case involves the extent to which States and local governments will be permitted to exercise their traditional police powers to promote the public health, safety and morals of their citizens by regulating undesirable conduct without being found to have violated the First Amendment. The States—the primary repositories of traditional police powers—have a fundamental interest in regulating behavior that adversely affects the health, safety and morals of their citizens, even if that behavior may also sometimes contain an expressive element. Thus, the issues raised in this case implicate more than just nude dancing, and are of critical importance to the States' ability to vindicate and protect the morals of their citizens.

SUMMARY OF THE ARGUMENT

In *Barnes*, this Court upheld, against a First Amendment free speech challenge, a local ordinance that generally prohibited nudity and required nude dancers in

commercial establishments to wear pasties and G-strings at all times. In doing so, the plurality applied the test for regulations restricting expressive conduct first articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), a case in which the United States had criminally prosecuted a young man for burning his draft card as part of a Vietnam War protest. In contrast, Justice Scalia, in a concurring opinion in *Barnes*, relied instead on a rational basis standard of review, arguing that the ordinance prohibiting public nudity was a general regulation of conduct that only incidentally affected expressive activities. *See Barnes*, 501 U.S. at 572-81 (Scalia, J., concurring). With all due respect, the *Amici* States urge the Court to expressly adopt the rational basis level of scrutiny for general state laws that regulate conduct with only an incidental affect on expressive activities.

1. A rational basis standard in this context is particularly appropriate for at least two reasons. First, on its face, the First Amendment protects freedom of "speech," not "conduct" or "expressive conduct." U.S. Const. Amend. I; *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). Importantly, the Court has expressly clarified that, although "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, . . . we view it as only marginally so." *Barnes*, 501 U.S. at 566; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (nude dancing qualifies as "the barest minimum of protected expression."); *California v. LaRue*, 409 U.S. 109, 188 (1972) (to same effect). Even some form of so-called "intermediate" scrutiny is inappropriate when addressing a general state law that regulates conduct and at most incidentally affects marginally expressive activities.

The Erie ordinance at issue here satisfies even "intermediate" scrutiny, but it should not be required to do so in order to pass First Amendment muster. Unlike the flag burning cases, for example, the Erie ordinance in no sense

"targets" the message conveyed by nude dancing; it does not even target nude dancing. Rather, like the ordinance this Court upheld in *Barnes*, the Erie ordinance is a general law that regulates conduct—public nudity—pursuant to the city's general police powers. Any affect on expressive activity, to the extent expression is implicated at all, is purely incidental. Thus, the real question is whether Erie has properly exercised its police powers, a rational basis inquiry, and not whether the First Amendment is violated here. "[V]irtually every law restricts conduct, and virtually any prohibited conduct can be performed with an expressive purpose." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). This is not a First Amendment case.

Obviously, if a law is not truly a general law that regulates conduct but, instead, is a thinly disguised effort to target constitutionally protected activities, it will not be immune from attack. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (ordinance prohibiting ritual sacrifice of animals is unconstitutional when directed solely at a particular religious sect); *United States v. Eichman*, 496 U.S. 310 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397 (1989) (same). On the other hand, applying heightened scrutiny to general state laws that regulate only conduct deprives the States of their traditional police powers and is repugnant to their dignity as sovereigns and guardians of their citizens' mores.

2. Second, in their role as primary regulators and guardians of public morality, the States and localities deserve substantial latitude in regulating conduct such as public nudity. Unlike Congress, which has only its Article I enumerated powers and is bound directly and explicitly by the strictures of the First Amendment, the States exercise traditional police powers explicitly reserved to them by the Tenth Amendment and subject only to the Fourteenth Amendment's requirements. Thus, the *O'Brien* test, which

the Court adopted in the context of a federal criminal prosecution arising from expressive activities, is not appropriate when dealing with traditional exercises of the States' and localities' fundamental police powers. *Buckley v. Valeo*, 424 U.S. 1, 290-92 (1976) (Rehnquist, J., concurring in part, dissenting in part); *Roth v. United States*, 354 U.S. 476, 504 (1957) (Harlan, J., concurring and dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting); William Van Alstyne, *A Graphic Review Of The Free Speech Clause*, 70 Cal. L. Rev. 107, 146 (1982).[1]

Indeed, in this setting, the States' governmental authority is considerably broader than that of Congress, and the constitutional bases for restricting the States' exercise of that authority considerably more limited than the constitutional constraints applicable to Congress. For those reasons, the constitutionality of each sovereign's laws may, at least in the circumstances presented here, require different scrutiny by the courts. The level of scrutiny may well depend in part on (1) whether the sovereign regulating the conduct has primary responsibility for governing with respect to such conduct, and (2) whether the "expression" at issue is

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[1] For example, the Court currently is considering whether a provision of the 1996 Communications Decency Act, a federal law that regulates "indecent" programming on cable television, violates the First Amendment. *See United States v. Playboy Entertainment Group, Inc.*, probable jurisdiction noted, 119 S. Ct. 2365 (June 21, 1999) (No. 98-1682). Even if this Court finds the statute in that case unconstitutional, that decision would not control here. First, cable programming is speech, not conduct and, in any event, Congress deserves less latitude than the States when prohibiting indecency. There is simply a much greater danger for the suppression of expression when Congress legislates on a national level, as it always does, than when individual States act.

"core" speech, such as political debate, or "marginal" expression, such as nude barroom dancing. Particularly when a regulation is not targeting speech and does not involve "core" speech interests, such as political expression, the States and localities should be given significant discretion under the Fourteenth Amendment to express and protect the morals of their citizens, just as they are in the context of regulating obscenity. *See, e.g., Miller v. California*, 413 U.S. 15, 30 (1973) (adopting "community standards" approach to regulation of obscenity, rather than a "fixed, uniform, national standard"); *cf. United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (recognizing the value of having States experiment with forms of social regulation and invoking Justice Brandeis' "laboratory" metaphor); *Alden v. Maine*, 119 S. Ct. 2240, 2247 (1999) (same point).

The Erie ordinance joins a long line of state and local laws prohibiting public nudity. These laws have always been enacted pursuant to the States' traditional police powers and, until recent years, would never have been thought even potentially violative of the Constitution. Subjecting such general state laws that regulate public morality to heightened scrutiny whenever free expression claims are raised would improperly and unnecessarily intrude on an area of traditional state sovereignty.

ARGUMENT

The *Amici* States urge the Court to expressly adopt rational basis review as the standard for evaluating challenges to the application of general state laws that regulate conduct and only incidentally affect expressive activities. Doing so is supported by the text of the First Amendment, as well as history and tradition, and is consistent with this Court's existing First Amendment jurisprudence.

I. Rational Basis Review Applies When A General State Law Regulates Conduct And Only Incidentally Affects Expression.

A. Laws That Neither Regulate "Speech" Nor Target Conduct Because Of An Expressive Component Do Not Implicate The First Amendment.

The First Amendment, applied to the States by virtue of this Court's Fourteenth Amendment decisions, prohibits Congress from "abridging the freedom of speech." U.S. Const. Amend. I. The Amendment's text, however, does not mention conduct, nor does it explicitly protect expressive conduct, other than speech. *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). Nonetheless, this Court has held that, because some conduct contains an expressive component, conduct in some instances is deserving of First Amendment protection. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (saluting a flag); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning a flag). But merely acknowledging that proposition begs the question in this case: Is a general state law that regulates conduct, that does not target expression, and that has at most an incidental affect on expressive activity, subject to heightened scrutiny under the First Amendment?

With all due respect, the answer to that question is "No." Rather, general laws enacted pursuant to traditional state police powers and regulating conduct irrespective of potential expressive components are subject only to rational basis review under the Due Process Clause of the Fourteenth Amendment. On its face, the Erie ordinance at issue in this case is directed only at conduct—public nudity—and does not target expression. The ordinance does not even purport

to regulate oral or written speech. Rather, the Erie ordinance makes public nudity—a form of conduct—unlawful, irrespective of an individual's motives or purposes for engaging in such conduct. Thus, under the Erie ordinance, it matters not whether the individual is attempting to convey a message of eroticism, *Barnes*, 501 U.S. at 581 (Souter, J., concurring), anti-eroticism, *Florida Free Beaches, Inc. v. Miami*, 734 F.2d 608 (11th Cir. 1984) (message that nudity is not indecent) or no message at all. *Barnes*, 501 U.S. at 581 (Souter, J., concurring) ("the choice to go nude . . . will often yield nothing: a person may choose nudity, for example, for maximum sunbathing").

The Erie ordinance simply is not directed at any expressive element that might (or might not) be present in the conduct being regulated. Instead, the Erie ordinance is a general law that regulates conduct for reasons related to the police power concerns arising from citizens engaging in that conduct.[2] No fundamental constitutional rights nor liberty interests of Erie's citizens are being restricted by an ordinance that simply prohibits public nudity. In short, this is not a First Amendment case.[3] Thus, there is no basis for any level of scrutiny higher than rational basis review.

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[2] "A law is 'general' for the present purposes if it regulates conduct without regard to whether that conduct is expressive." *Barnes*, 501 at 575 n. 3 (Scalia, J., concurring.)

[3] "Moral opposition to nudity supplies a rational basis for its prohibition, and since the First Amendment has no application to this case no more than that is needed." *Barnes*, 501 U.S. at 580 (Scalia, J., concurring).

B. Applying Rational Basis Review To General Laws That Regulate Conduct Is Consistent With Existing First Amendment Principles.

Applying rational basis review to general laws that regulate conduct with at most an incidental affect on expressive activity is fully consistent with this Court's First Amendment jurisprudence. Laws that directly regulate speech and laws that target conduct because of its expressive component are necessarily subject to rigorous scrutiny under the First Amendment.

Thus, laws that directly affect pure speech, "even for a purpose that has nothing to do with the suppression of expression, . . . [are subject to] the high, First Amendment standard of justification." *Barnes*, 501 U.S. at 576 (Scalia, J., concurring). For example, laws that restrict noise and regulate election campaigns, *e.g.*, *Saia v. New York*, 334 U.S. 558 (1948) (noise); *Buckley v. Valeo*, 424 U.S. 1 (1976) (election campaigns), have been subjected to rigorous scrutiny because such laws directly regulate speech activities. The Court applied such scrutiny even though the laws at issue were enacted for purposes unrelated to the content or viewpoint of the speech being restricted.

Similarly, when a law targets conduct precisely because of its expressive component, or purports to be a general regulation of conduct when in fact the purpose of the law is to restrict protected activity, this Court has applied heightened scrutiny under the First Amendment. *See, e.g.*, *Hialeah*, 508 U.S. 520 (1993) (ordinance prohibiting ritual sacrifice of animals is unconstitutional when directed solely at a particular religious sect); *Eichman*, 496 U.S. 310 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397 (same); *Spence v. Washington*, 418 U.S. 405 (1974) (defacing the flag); *Tinker v. Des Moines Indep. Comm. School Dist.*, 359

U.S. 503 (1969) (wearing black armbands); *Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-ins); *Stromberg v. California*, 283 U.S. 359 (1931) (flying a red flag). In such cases, the suppression of constitutionality protected activity or expression was the primary purpose of the law.

The Court has always applied less exacting review, however, when the primary purpose of a law is to regulate conduct, not expression, and the law at most incidentally affects expressive conduct. The Court articulated a four-part test for evaluating such laws in *O'Brien*, and it is clear that the *O'Brien* standard is considerably less rigorous than the standard applied to cases involving direct regulation of pure speech, as this Court's decisions make plain. *See, e.g., FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411 (1990) (antitrust law can be applied to conduct that involves expressive component); *United States v. Albertini*, 472 U.S. 675 (1985) (rule against entering military bases upheld as applied to war protestors); *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (rule against sleeping in parks upheld as applied to activists seeking to publicize plight of the homeless).

A plurality of the Court applied the *O'Brien* "intermediate" scrutiny in *Barnes* and easily concluded that the ordinance at issue there—requiring nude barroom dancers to wear pasties and a G-string—was constitutional as applied. Moreover, as the plurality's application of the *O'Brien* standard in *Barnes* demonstrates, there may not be a great difference between "intermediate" scrutiny and rational basis review, at least in the context of laws regulating public indecency. *See Barnes*, 501 U.S. at 579 (Scalia, J., concurring) (recognizing congruence of rational basis review and the plurality's application of *O'Brien* in the *Barnes* case). And contrary to the Pennsylvania Supreme Court's decision in this case, the Erie ordinance passes muster even under the *Barnes* plurality/*O'Brien* standard.

Nonetheless, there remain compelling reasons for expressly adopting rational basis review in this context. The constitutional reasons for rejecting a higher level of scrutiny are addressed in the next section of the brief. But there are also practical considerations that compel rational basis review. Subjecting general state laws that regulate conduct to heightened scrutiny simply because those laws may incidentally affect expressive activity results in virtually all state and local laws being potentially subject to such scrutiny because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Barnes*, 501 U.S. at 576 (Scalia, J., concurring) ("virtually every law restricts conduct, and virtually any prohibited conduct can be performed with an expressive purpose").[4] Reserving heightened scrutiny for laws that regulate speech itself, or target conduct precisely because of its expressive component, while applying rational basis review to general laws that regulate conduct pursuant to traditional police powers, affords citizens with the appropriate level of

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[4] Adopting rational basis review in this context also would harmonize this Court's First Amendment free expression doctrine with its free exercise jurisprudence as articulated in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Creating a different standard for free exercise and freedom of expression claims raises the specter that an ordinance, such as the Erie ordinance in this case, could be constitutional as applied to religious activity (supposing public nudity were a tenet of a particular religion), but not if applied to barroom dancing. *Cf. Barnes*, 501 U.S. at 579 (Scalia, J., concurring) (noting the incongruency).

constitutional protection while also respecting the sovereignty of the States, particularly in matters involving the health, safety and morals of their citizens.[5]

The crucial point here is that the government should be able to pursue its legitimate interests in regulating socially pernicious conduct. If such legitimate regulation, not adopted for the purpose of suppressing expression, happens to interfere with an individual's personal expression, then the First Amendment fully permits that individual to find a way to communicate the message without engaging in the socially pernicious conduct. Requiring a person to find alternative means of communication other than socially pernicious conduct—which the government has chosen generally to prohibit as such—is a reasonable and constitutionally permissible accommodation between the value of free speech and the value of protecting society from pernicious conduct.

This principle, moreover, fully applies in this context. Nudity in public venues—places open to the public—is socially harmful behavior, as public indecency laws long have recognized. Thus, the government may generally prohibit public nudity, and anyone who wishes to communicate a message through public nudity simply must find a different means of doing so.

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[5] "Such a regime ensures that the government does not act to suppress communication, without requiring that all conduct-restricting regulation (which means in effect all regulation) survive an enhanced level of scrutiny." *Barnes*, 501 U.S. at 578-79 (Scalia, J., concurring).

II. Principles Of Federalism Require Deference To General State Laws That Regulate Conduct Pursuant to Traditional Police Powers.

A. The States And Localities Are The Primary Regulators And Guardians Of Public Morality.

This Court previously has recognized that public indecency laws, such as the Erie ordinance at issue here, are "designed to protect morals and public order." *Barnes*, 501 U.S. at 569. Indeed, there is no question that the Erie ordinance is one in a long line of state, county and city laws that regulates public indecency pursuant to traditional police powers explicitly reserved to the States by the Tenth Amendment. "The traditional police power of the States is defined as the authority to provide for the public health, safety and morals, and [this Court] ha[s] upheld such a basis for [public indecency] legislation." *Id. See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973) (upholding regulation of obscenity and recognizing "the interest of the public in the quality of life and the total community environment"); *Roth v. United States*, 354 U.S. 476, 485 (1957).

The States' regulation of public indecency has extensive historical roots. Prohibitions of public nudity date back more than 300 years in the common law. *See, e.g., LeRoy v. Sidley*, 1 Sid. 168, 82 Eng. Rep. 1036 (K.B. 1664) (cited in *Barnes*, 501 U.S. at 568); *see also Winters v. New York*, 333 U.S. 507, 515 (1948) (discussing common law roots of the criminal offense of "gross and open indecency"). This Court has declared that public indecency laws "are of ancient origin and presently exist in at least 47 States." *Barnes*, 501 U.S. at 568; *see also Lewdness, Indecency, and Obscenity*, 50 Am. Jr. 2d 449, 472-74 (1970); Annot., *Criminal Offense Predicated On Indecent Exposure*, 93

A.L.R. 996, 997-98 (1934). Virtually all of the States, and hundreds (if not thousands) of municipalities, have laws that make public nudity illegal. (See Appendix for state laws.) These laws regulate or prohibit public nudity generally, and do not single out nude dancing or nudity involving an expressive component.

As history demonstrates, and the Tenth Amendment recognizes, the States and local governments have long been considered the primary guardians of public morality, particularly in the public indecency context. Indeed, the States "bear direct responsibility for the protection of the local moral fabric." *Roth*, 354 U.S. at 504-05 (Harlan, J., concurring and dissenting). Although communities are free, for example, to tolerate nude beaches or bars featuring nude dancing, the Constitution should not require them to do so. Similarly, if a community's citizens prefer not to tolerate such activities, the Constitution should not prevent them from expressing that community judgment in the form of a law banning or regulating public indecency.

There is no fundamental constitutional right to engage in public nudity, and no need for a single, uniform federal rule regarding public indecency. Rather, the regulation (or lack thereof) of public indecency falls squarely within the traditional police powers that the Tenth Amendment reserves to the States, and with good reason. Principles of federalism suggest that States and local governments should be free to calibrate their public indecency laws to the moral judgments and values of their citizens.

B. At Least In The Context Of Public Indecency, The States Are Entitled To More Deference Than Congress When Regulating Pursuant To Traditional Police Powers.

When exercising their traditional police powers to regulate matters that do not implicate fundamental constitutional rights or other federal interests, the States are entitled to considerable latitude. It is a fundamental aspect of our constitutional system of government, recognized in both Article I, section 8 and the Tenth Amendment, that there is a difference "between the areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government." *Roth*, 354 U.S. at 503 (1957) (Harlan, J., concurring and dissenting). The regulation of public indecency falls clearly within traditional State sovereignty.

In *Roth*, the Court acknowledged but did not have to resolve the potential difference between federal and state power to regulate obscenity. Importantly, *Roth* actually involved two obscenity cases. In one case, the defendant was convicted of violating a California obscenity law, while in the other, the defendant was convicted of violating a federal obscenity statute. A majority of the Court affirmed both convictions, finding that no issue was "presented in either case concerning the obscenity of the material involved." 354 U.S. at 481 n. 8. Thus, the dispositive question was whether, as a matter of law, the Constitution protects obscenity at all. The Court expressly held that obscenity receives no constitutional protection. *Id.* at 485.[6] For that reason, the

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[6] The Court has in subsequent cases reaffirmed that obscenity is a category of expression that the First Amendment does not protect. *See, e.g., Alexander v. United States*, 509 U.S. 544 (1993); *Paris Adult Theater I*; *Miller*.

Court affirmed both convictions and found no reason to explore whether Congress's power to regulate expression might differ from the States' power to do so. *Id.* at 492 n. 31.

Justice Harlan, however, dissented from the affirmance of the federal conviction, precisely because he found a distinction between federal and state power in this context. *Id.* at 496-508. The two differences in federal and state authority in this context are (1) *textual* —that the First Amendment directly restrains Congress, while the States need only satisfy the Fourteenth Amendment's requirements, *see, e.g., Beauharnais*, 343 U.S. at 287 (1952) (Jackson, J., dissenting), and (2) *structural*—that the States have general police powers while Congress has only its enumerated powers under Article I. Relying on those differences, and addressing the federal conviction, Justice Harlan observed that

> To me, this question is of quite a different order than one where we are dealing with state legislation under the Fourteenth Amendment. I do not think it follows that state and federal powers in this area are the same, and that just because the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same.

Roth, 354 U.S. at 503. Recognizing that the "substantive powers of the two governments, in many instances, are distinct," *id.*, Justice Harlan argued that

> [I]n every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal. Since under our constitutional scheme the two

> are not necessarily equivalent, the balancing process must needs often produce different results.

Id. at 504. Justice Harlan emphasized that "Congress has no substantive power over sexual morality," unlike the States, "which bear direct responsibility for the protection of the local moral fabric." *Id.*[7] Thus, even apart from any differences between the First and Fourteenth Amendments, the Constitution's *structure* recognizes differences between state and federal regulatory power.

The Court later held that the Constitution does permit at least some diversity among the States in the area of public morality, even in the face of First Amendment free expression claims. Thus, in *Miller*, the Court adopted a "community standards" approach to the problem of defining "obscenity" for constitutional purposes. *Id.*, 413 U.S. at 30 (what is "obscene"—and therefore unprotected by the First Amendment under *Roth*—is not resolvable by reference to a "fixed, uniform national standard"). Rather, the Court properly recognized that "[o]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Id.* Furthermore, the Court explicitly recognized that "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of

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[7] Similarly, the Chief Justice has in the past expressed support for Justice Harlan's view that, at least in some instances, the freedom of expression principles applicable to the States by virtue of the Due Process Clause of the Fourteenth Amendment may differ from the First Amendment principles that directly govern Congress. *See, e.g., Buckley*, 424 U.S. at 290-92 (1976) (Rehnquist, J., concurring in part, dissenting in part).

imposed uniformity." *Id.* at 33. Although the Erie ordinance is not an effort to prohibit or punish the distribution or promotion of obscenity, this Court's reasons for adopting a "community standards" definition of obscenity apply with equal force in the public indecency context.

The recognition of a difference between Congress's power to regulate expression, explicitly constrained by the First Amendment, and state power to regulate, constrained instead by the Fourteenth Amendment, is sound, at least in the circumstances presented in this case. When dealing with public nudity, moral judgments cannot be avoided (since the Constitution does not altogether prohibit the State and its citizens from making such judgments), and thus State laws regulating such conduct deserve considerable deference. That proposition holds even if the same level of deference might not be given to congressional efforts to regulate such conduct at a national level pursuant to Article I powers. "Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality." *Roth*, 354 U.S. at 502 (Harlan, J., concurring and dissenting).[8]

It would be virtually impossible, as well as undesirable, to formulate a single, national public indecency standard. Some States, counties and cities may be willing to tolerate many forms of public nudity, while others tolerate some forms of public nudity but not others, and yet others may prefer to prohibit all forms of public nudity. Any effort

[8] This Court also has recognized that the States' concern, and consequently their authority, is heightened in the context of regulating live, physical conduct such as public nudity. *See, e.g., Miller*, 413 U.S. at 26 n. 8 ("the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior").

to constitutionalize and federalize the choices available to thousands of local governments would undermine a fundamental value of federalism.[9]

Recognizing a distinction between federal and state authority to regulate in the context of public indecency presents no threat to First Amendment values, and indeed in some ways could enhance the promotion of those values. "[T]he virtue of a differential first amendment/fourteenth amendment regime might be to read the first amendment for all that it is worth, confining Congress very tightly. Somewhat more (albeit not too much more) play may be left in applying the fourteenth amendment to the processes of state and of local government." William Van Alstyne, *A Graphic Review Of The Free Speech Clause*, 70 Cal. L. Rev. 107, 145 (1982).

[9] One of the Nation's leading First Amendment scholars has observed that

> The prerogative of federalism from this perspective is at bottom a prerogative of diversity among state regimes of law and of culture, beyond the veto of others whom it may affront and beyond congressional command for uniformity of behavior or of law. The extent of that prerogative, moreover, has nothing to do with the separate limitations thrown onto Congress by the Bill of Rights. Indeed, it antedates the Bill of Rights and in several respects grants greater space than does the Bill of Rights.

William Van Alstyne, *Federalism, Congress, The States And The Tenth Amendment: Adrift In The Cellophone Sea*, 1987 Duke L.J. 769, 772.

The States and local governments should be free to find their own solutions to the social problems presented by public indecency. Principles of federalism demand the opportunity for local, community-based efforts to address such social issues. A national standard derived from the First Amendment's restrictions on Congress runs counter to those principles and the Tenth Amendment by intruding on a fundamental aspect of the States' traditional police power to act for the protection of the health, safety and morals of their citizens.

CONCLUSION

For the foregoing reasons, the *Amici* States urge the Court to adopt rational basis review for general state and local laws that regulate conduct pursuant to traditional police powers and that have at most an incidental affect on expressive conduct.

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August 16, 1999

APPENDIX

PUBLIC INDECENCY STATUTES

State	Statute
Alabama	Ala. Code § 13A-6-68 (1998)
Alaska	Alaska Stat. § 11.41.460 (Michie 1999)
Arizona	Ariz. Rev. Stat. § 13-1402 (1999)
Arkansas	Ark. Code Ann. § 5-14-112 (Michie 1997)
California	Cal. Penal Code § 314 (West 1999)
Colorado	Colo. Rev. Stat. § 18-7-301 (1998)
Connecticut	Conn. Gen. Stat. § 53a-186 (1999)
Delaware	11 Del. Code §§ 764, 1361-64 (1998)
Florida	Fla. Stat. § 800.03 (West 1999)

State	Statute
Georgia	O.C.G.A. § 16-6-8 (1998); *see also* Ga Const. Art III § VI, ¶ VII; *Goldrush II v. City of Marietta*, 267 Ga. 683 (1997) *cert. denied* 118 S. Ct. 70 (1997)
Idaho	Id. Code § 18-4116 (1998)
Illinois	720 Ill. Comp. Stat. 5/11-9 (West 1999)
Indiana	Ind. Code § 35-45-4-1 (1998)
Iowa	Iowa Code § 728.5 (1999)
Kansas	Kan. Stat. Ann. § 21-3508 (1998)
Kentucky	Ky. Rev. Stat. Ann. § 510.150 (Banks-Baldwin 1998)
Louisiana	La. Rev. Stat. Ann. §§14:106; 26:90; 26:286 (West 1998)
Maine	Me. Rev. Stat. Ann. tit. 17-A, § 854 (West 1997)
Maryland	Md. Crm. Law Code Ann. §§ 335A, 418B (1998); Md Ann. Code art. 2B, §10-405 (1998)

State	Statute
Massachusetts	Mass. Gen. Law ch. 272, § 16 (1998)
Michigan	Mich. Comp. Laws § 750.335a (1998)
Mississippi	Miss. Code Ann. § 97-29-31 (1998)
Montana	Mont. Code Ann. § 45-5-504 (1999)
Nevada	Nev. Rev. Stat. § 201.220 (1997)
New Hampshire	N.H. Rev. Stat. Ann. § 645.1 (1998)
New Jersey	N.J. Stat. Ann. § 2C:14-4 (West 1998)
New Mexico	N.M. Stat. Ann. § 30-9-14 (Michie 1998)
New York	N.Y. Penal Law § 245.00 (McKinney 1999)
North Carolina	N.C. Gen. Stat. § 14-190.9 (1990)
North Dakota	N.D. Cent. Code § 12.1-20-12.2 (1997)
Ohio	Ohio Rev. Code Ann. § 2907.09 (Anderson 1999)

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Oklahoma	Okl. Stat. tit. 21 § 1021 (1998)
Oregon	Or. Rev. Stat. § 163.465 (1990)
Pennsylvania	Pa. Stat. Ann. tit.18 § 5901 (Purdon 1990)
South Carolina	S.C. Code Ann. § 16-15-130 (Law Co-op1998), § 16-15-365
Tennessee	Tenn. Code Ann. § 39-13-511 (1990)
Texas	Tex. Penal Code Ann. § 21.07 (West 1997)
Utah	Utah Code Ann § 76-9-702 (Supp. 1998)
Vermont	Vt. Stat. Ann. tit. 13 § 2601 (1998)
Virginia	Va. Code Ann. §18.2-387 (Michie 1990)
Washington	Wash. Rev. Code § 9A.88.010 (1990)
West Virginia	W.Va. Code § 61-8B-10 (1990)

State	Statute
Wisconsin	Wisc. Stat. Ann. § 944.20 (West 1999)
Wyoming	Wyo. Stat. Ann. § 6-4-2-1 (Michie 1990)

Supreme Court, U.S.
FILED
AUG 16 1999
OFFICE OF THE CLERK

(11)

No. 98-1161

IN THE

Supreme Court of The United States

OCTOBER TERM, 1998

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

PETITIONERS,

V.

PAP'S A.M., T/D/B/A "KANDYLAND",

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF BREVARD COUNTY, FLORIDA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONERS

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF THE PETITIONERS

Amicus Curiae, Brevard County, Florida, respectfully files its Brief in Support of the Petitioners in this case as follows:

QUESTION PRESENTED

Did the Pennsylvania Supreme Court improperly strike the ordinance of Erie, Pennsylvania, thereby willfully disregarding binding precedent in violation of the supremacy clause?

INTEREST OF THE *AMICUS CURIAE*

The County Attorney for the *Amicus Curiae*, Brevard County Board of County Commissioners ("Brevard County"), submits this brief pursuant to Supreme Court Rule 37.4, on behalf of Brevard County, Florida, and its political subdivisions, to bring to the Court's attention the adverse impact on Brevard County and other local governments by the Pennsylvania Supreme Court's interpretation of *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991). Brevard County submits this brief in support of the position taken by Petitioners, City of Erie, et al., and urges this Court to reverse the decision of the court below.

Brevard County, like the City of Erie, has enacted an indecency ordinance that is virtually the same as the Indiana statute upheld in *Barnes*. Brevard County has attempted to balance First Amendment concerns with the need to provide for the morality, health and welfare of its citizens and prevent the secondary effects associated with public nudity. Brevard County seeks clear direction from this Supreme Court on how legislative and judicial bodies should interpret this decision to

avoid wasting taxpayers' money; judicial time and resources; and most important, violating the Constitution.

SUMMARY OF THE ARGUMENT

The Pennsylvania Supreme Court violated the supremacy clause by not accepting the plurality opinion of *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991), as binding precedent. *Stare decisis* and uniformity requires that the same regulation upheld by the United States Supreme Court for the benefit of the State of Indiana must be upheld for other jurisdictions as well.

Brevard County also urges the Court to clarify the *Barnes* decision by first applying the test articulated by *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). In determining whether conduct is protected "speech" a fact determination must be made that the "speaker" is (1) intending to convey; (2) a particularized message: (3) with a great likelihood that the message will be understood. Only if the barroom dancer proves to a jury that her nude dance is protected speech, should the burden shift to the government to prove that the restrictions of an indecency ordinance as applied to the dance comport with the requirements of the test enunciated in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

ARGUMENT

I. SUPREMACY CLAUSE

The Pennsylvania Supreme Court has determined, that although the City of Erie's ordinance ("Erie Ordinance") was "strikingly similar" to the Indiana statute upheld by this Court in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991), the Erie Ordinance must be stricken as unconstitutional. *Pap's A.M. v. City of Erie*, 719 A.2d 273,

278-279 (Pa. 1998). The Pennsylvania Supreme Court brazenly states that a plurality opinion does not bind the lower courts to its holding. *Id.*

To support its ruling, the court stated, ". . . aside from the agreement by a majority of the *Barnes* Court that nude dancing is entitled to some First Amendment protection, we can find no point on which a majority of the *Barnes* Court agreed." *Id.* The Pennsylvania Supreme Court has overlooked the most obvious point of agreement by the majority of the *Barnes* Court: the Indiana statute was held to be constitutional. Although the five justice majority voted to uphold the Indiana's indecency statute on different grounds, they all agreed that the Indiana statute was constitutional. *Barnes*, 501 U.S. 560.

States and local governments like Brevard County have enacted laws similar to the Indiana statute, so that their citizens may enjoy the same protections as Indiana's citizens. The *Barnes* court gave these governments very little guidance in drafting indecency laws. However, the governments relied on the fact that the Indiana statute was constitutional and modeled their laws after the Indiana statute. If the *Barnes* decision is not binding, then each of these governments must defend its law in its own state or federal courts. This result, of course, frustrates the concepts of *stare decisis* and uniformity.

Brevard County urges this Court to declare that the plurality holding of *Barnes* is binding on lower courts. Additionally, Brevard County implores this Court to give legislative bodies more guidance than the holding in *Barnes*.

II. *BARNES* SHOULD BE CLARIFIED

All nine justices of the *Barnes* court agreed that the government had a right to protect non-consenting observers from displays of public nudity (*e.g.*, public beaches), and Brevard County requests the Court to reaffirm that position as

an incident to deciding this case. However, a severe split arose as to whether the government has the right to prevent public nudity in places of public accommodations, where all observers are consenting viewers (*i.e.*, adult entertainment bars). In the lead opinion, Justice Rehnquist stated that nude dancing "might be entitled to First and Fourteenth Amendment protection under some circumstances.", *Barnes*, 501 U.S. at 565, then applied the four-prong test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) and upheld the Indiana statute as being (1) within the constitutional power of the government; (2) furthering an important or substantial government interest; (3) a governmental interest unrelated to the suppression of free expression; and (4) an incidental restriction on any alleged First Amendment freedoms that is no greater than is essential to the furtherance of that governmental interest.

While four justices adhered to the holding Indiana could prohibit public nudity in adult entertainment establishments, the plurality opinion did not address Justice Souter's secondary effects analysis nor the dissent of the four justices who would appear to have decided that Indiana cannot prohibit nudity in this context. Nor does the plurality opinion address the sticky distinction between nude barroom dancing and bona fide nude theater productions such as "Hair" and "Equus", as was alluded to by both Justice Souter, *Barnes*, 501 U.S. at 585, fn. 2 (Souter, J., concurring), and the dissent. *Barnes*, 501 U.S. at 594 (White, J., dissenting). The adoption of the rationale outlined below would enable the Court to overcome the legal difficulties intrinsic in making such fine distinctions.

Since this case involves an indecency ordinance that purports to prohibit nude dancing in adult entertainment establishments, Brevard County advances Justice Rehnquist's recognition of *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 342 (1972), for the proposition that speech is not necessarily present in every case involving nude "barroom" dancing, a notion that suggests the need for a "speech" analysis

prior to the application of the *O'Brien* test. In such cases the County would argue for the adoption of a legal process that requires a preliminary determination as to whether a particular nude barroom dance constitutes protected speech at all under the test set forth in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) before the *O'Brien* test is applied. Brevard County urges that this Court establish a process whereby a jury, as the trier of fact, first apply the *Johnson* standard and determine, based on the evidence, whether a nude dancer's conduct is intended to convey a particularized message with a great likelihood that the message will be understood. Only if a determination that protected "speech" is present under that standard, should it be necessary to apply the *O'Brien* analysis to determine the validity of the government's attempt to regulate such protected speech.

Such a two-step approach would diffuse the *Barnes* dissent which criticizes the plurality opinion which would allow a nude ballet performed at Lincoln Center as protected while prohibiting substantially the same dance when performed in a bar. *Barnes*, 501 U.S. at 594 (White, J., dissenting). The authors of the *Barnes* dissent see no difference in the two dances. However, there may be a true distinction in the dances when the *Johnson* test is applied to the evidence by a jury. Upon review of the evidence adduced at a trial, the jury may view the Dance of the Seven Veils performed by a nude barroom Salome differently from the same nude dance performed by a ballerina Salome as part of a ballet. The evidence may show that the typical barroom Salome had no intent to convey a particularized message with a great likelihood that the message would be understood by her audience, as does the evidence in the case at bar where the barroom dancer testified that she danced to induce monetary rewards from her audience. Just as the biblical Salome danced to seduce Herod into executing John the Baptist, today's barroom Salome seeks tips and beer sales. Both dances involve conduct, but a jury could easily conclude from the evidence that neither involves protected speech.

In contrast, a ballet or theatrical production must viewed as a whole. *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed. 2d 448 (1975). When viewed as part of entire production, the Dance of the Seven Veils is likely to be understood by the audience, and a jury, as the dramatic and defining moment in the biblical story of John the Baptist's death.

Notably, the assessment of nude dance as protected "speech" or unprotected conduct under the *Johnson* test (as the first step in the two-step process proposed by the County) is essentially the same process that was adopted by this Court in commissioning juries to apply the community standards test in obscenity cases. *Miller v. California*, 413 U.S. 881, 94 S.Ct. 26, 37 L.Ed. 419 (1973). Under both processes, the trier of fact determines if the subject matter of the litigation is protected or unprotected under the First Amendment. Only if the trier of fact makes a finding that the nude dance is protected "speech" under the *Johnson* standard would the *O'Brien* test be invoked and applied.

The importance of resorting to *O'Brien* as the *second* step in testing the validity of the indecency regulations is illustrated by an interesting irony. The fourth part of the *O'Brien* test requires that the questioned regulation impose only an incidental restriction on "speech" that is no greater than is essential to the furtherance of the governmental interest. *O'Brien*, 391 U.S. 367. In *Barnes*, the requirement of the scant amount of clothing was viewed as incidental to whatever erotic message the "barroom" dancers where trying to convey. *Barnes* at 501 U.S. at 571. However, that same "clothing" limitation applied to Salome's ballet or to a production of "Hair" may actually destroy the literary, artistic or political message the author and actors are intending to convey.

The simplest way way to eliminate the possibility of an unintended consequence of *O'Brien* as applied to governmental

restrictions on nude dancing is to first turn to a jury for a determination as to whether a particular dance taken in context is protected speech or unprotected conduct under the *Johnson* test. Under the County's proposal, where a barroom dancer is cited for violating the indecency ordinance by performing the Dance of the Seven Veils in the nude, it becomes the barroom Salome's burden to convince a jury that she intended to convey a message and that there was a great likelihood that the message would be understood by her audience. *Clark v. Community For Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 3069, 82 L.Ed. 2d 221 (1984). Only if she was successful in doing so, would the burden shift to the government to prove, as a mixed question of law and fact, *see, City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, ____U.S. ____, 119 S.Ct. 1624, ____L.Ed.2d ____ (1999), that its indecency regulations pass constitutional muster under the four prong *O'Brien* test.

The Court's alternative to this process is to recede from *California v. La Rue* and treat all nude dance as protected speech under the First Amendment. If this Court determines that barroom nude dancing is always protected speech, Brevard County urges this Court to adopt the view in the *Barnes* lead opinion that the government's important and substantial interest in protecting societal order and morality justifies its incidental minimal covering restrictions on nude dancing. *Barnes*, 501 U.S. at 568. Although lower courts have followed Justice Souter's attempts to spare bona fide artistic productions such as "Hair" and "Oh Calcutta" by treating nude dance as protected speech while applying his secondary effects analysis as the narrowest opinion in the *Barnes* plurality decision, Justice Rehnquist points out that the *Barnes* record did not include any intent of the Indiana Legislature to prevent such harmful secondary effects. *Barnes*, 501 U.S. at 568. But, this Court need not look to secondary effects analysis as the justification for allowing restricted government regulation of nude literary, artistic or political expression. In the adult entertainment context, the Court should sanction a factual determination as to

whether protected speech is involved at all as a threshold issue. Only if it is determined that protected speech is involved will it become necessary to apply secondary effects analysis or the *O'Brien* test to determine whether the prohibition is an incidental restriction on protected speech.

CONCLUSION

This Court should reverse the decision of the Pennsylvania Supreme Court as a violation of the supremacy clause. The Court should also take this opportunity to clarify the *Barnes* decision by holding that in cases involving nude barroom dancing, lower courts must first apply the *Johnson* test to determine whether speech is involved before proceeding to an application of the *O'Brien* test.

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No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF ERIE, PA., *et al.*,
Petitioners,

v.

PAP'S A.M.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF ORANGE COUNTY, FLORIDA, BY THE HONORABLE MEL MARTINEZ, AS COUNTY CHAIRMAN FOR ORANGE COUNTY, FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus is Orange County, Florida, a body corporate and politic existing under the laws of the State of Florida and the Orange County Charter. The Honorable Mel Martinez is the duly elected County Chairman for Orange County under the Orange County Charter. Pursuant to the Orange County Charter, the County Chairman is the chief executive of Orange County, with the authority to assure the faithful execution of all Orange County ordinances, resolutions and orders, and to ensure that they are enforced.

Orange County is presently defending against a challenge to the federal constitutionality of a public nudity ordinance similar to the City of Erie's public indecency ordinance. Orange County's Public Nudity Ordinance, adopted by the Orange County Board of County Commissioners by Ordinance No. 92-33 on October 28, 1992, and codified at Section 26-26 of the Orange County Code, is reprinted in full in the Appendix.

The subject federal lawsuit has been brought against Orange County in the Middle District Court for Florida by a career nude barroom stripper, in a case styled *Kim Gatena v. Orange County, Florida,* Case No. 98-417-CIV-ORL-22B. The Honorable Anne C. Conway, District Judge, is presiding. Ms. Gatena is contending in part, as does Respondent regarding Erie's ordinance, that the Orange County Ordinance is content based contrary to the Free Speech Clause of the First Amendment to the United States Constitution, and is unconstitutionally overbroad.

At present, District Judge Conway has under review competing motions for summary judgment and accompanying memorandums of law. Like a majority of the Supreme Court of Pennsylvania declared in *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), Ms. Gatena is asserting, in part, that *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a plurality opinion where this Court upheld the federal constitutionality of a nearly identical Indiana public indecency statute, is impossible to understand, and is not binding precedent.

Amicus, being faced through its County Chairman with the duty of executing and enforcing the laws of Orange County, Florida, and the burden of defending against such federal lawsuits, has an interest in the resolution of the issue of whether a public nudity law along the lines of the City of Erie's passes constitutional muster.

Additionally, *amicus* has an interest in this Court revisiting the question of whether nude barroom "dancing" is indeed nonverbal expression as a matter of law.

SUMMARY OF ARGUMENT

Amicus maintains that this Court should decide that the Supreme Court of Pennsylvania erred in holding that Sections 1(c) and 2 of the Erie ordinance violate the Free Speech Clause of the First Amendment to the United States Constitution after it subjected the Erie ordinance to the strict scrutiny standard of review reserved for content-based regulations. In *Barnes*, a majority of this Court declined to apply the strict scrutiny test in upholding the federal constitutionality of a nearly identical Indiana public indecency statute.

Amicus also asserts that this Court should reexamine the issue of whether nude barroom strippers are engaged in nonverbal expression that is the functional equivalent of speech, as opposed to unprotected conduct, by referring to the two-part test set forth by this Court in *Spence v. Washington*, 418 U.S. 405 (1974), and hold that such activity should not automatically be deemed protected expression under the First Amendment.

ARGUMENT

I. THE SUPREME COURT OF PENNSYLVANIA ERRED IN DECIDING THAT *BARNES v. GLEN THEATRE, INC.* DOES NOT CONSTITUTE BINDING PRECEDENT TO UPHOLD SECTIONS 1(c) AND 2 OF THE CITY OF ERIE'S PUBLIC INDECENCY ORDINANCE PROHIBITING PUBLIC NUDITY AGAINST A CHALLENGE THAT IT VIOLATES THE FIRST AMENDMENT

In *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), the Supreme Court of Pennsylvania reviewed Sections 1(c) and 2 of the City of Erie's public indecency ordinance against a challenge that the Erie ordinance violated the Free Speech Clause of the First Amendment to the United States Constitution.

Section 1(c)of the Erie ordinance reads as follows:

> Section 1 . . .
> 1. A person who knowingly or intentionally, in a public place:
> . . .
> c. appears in a state of nudity, . . .
> . . . commits Public Indecency, a Summary Offense.

Section 2 defines the word "Nudity." Section 3 defines the term "Public Place" as "includ[ing] all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, . . ."

The Erie ordinance unequivocally announces in its preamble that the ordinance was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Despite acknowledging the "striking[] similar[ity]" between the Erie ordinance and an Indiana public indecency statute upheld by this Court in *Barnes*, *Pap's A.M.*, 719 A. 2d at 277, a majority of the Pennsylvania Supreme Court played kickball with *Barnes*, and compounded matters by circling the bases in the wrong direction. Not once, but twice, the majority in *Pap's A.M.* described the *Barnes* decision as "hopelessly fragmented." *Pap's A.M.*, 719 A. 2d at 276-77. While the *Barnes* decision was clearly "fragmented" (being a plurality opinion), the situation is not "hopeless."

Notwithstanding the plurality nature of the decision, it is undisputed that a majority of the *Barnes* Court --- five of the nine Members to be exact --- held that the nearly identical Indiana public nudity statute was valid and constitutional. In so doing, those five Justices concluded that the Indiana statute was not aimed at the suppression of expression protected by the First Amendment. Accordingly, none of those Justices believed that it was appropriate to resort to the strict scrutiny standard of review applicable to content-based laws.

Nevertheless, a majority of the Pennsylvania Supreme Court declared in *Pap's A.M.* that, aside from an agreement by eight of the nine Justices in *Barnes* that nude barroom dancing is entitled to some First Amendment protection, "we can find no point on which a majority of the *Barnes* Court agreed," and claimed that "no clear precedent arises out of *Barnes* on the issue of whether the [Erie] Ordinance . . . passes muster under the First Amendment." *Pap's A.M.*, 719 A. 2d at 278. As a consequence of its misreading of *Barnes*, the majority had no choice but to erroneously ascribe to the position of the *dissent* in *Barnes*, and utilize the strict scrutiny test to strike down the

Erie ordinance.

The concurring Justice in *Pap's A.M.* cogently summarized the core flaw with the majority's decision:

> I believe that the majority herein strains to find discord in *Barnes* where none exists. In so doing, the majority circumvents binding United States Supreme Court precedent. My disagreement with the majority centers on the fact that five Justices, and thus a majority, voted to uphold the ordinance in *Barnes* on the basis that the ordinance at issue in *Barnes* could not be characterized as relating to the suppression of free expression for purposes of the First Amendment. Therefore, a five-Justice majority declined to apply the strict scrutiny test.

Pap's A.M., 719 A. 2d at 282 (Castille, J., concurring).[1]

Because *Barnes* was a plurality decision, it is helpful to examine in greater detail the three opinions that made up the five-Member majority, remembering that the following principle regarding plurality opinions was enunciated in *Marks v. United States*, 430 U.S. 188, 193 (1977), citing *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976):

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred

[1]The concurring Justice in *Pap's A.M.*, joined by another, concurred in the result reached by the majority based upon a belief that Sections 1(c) and 2 of the Erie ordinance violate Article I, Section 7 of the Pennsylvania Constitution, the counterpart to the First Amendment of the United States Constitution. *Pap's A.M.*, 719 A. 2d at 283-84. In so doing, he stated that the Supreme Court of Pennsylvania "has repeatedly determined that Article I, Section 7 affords greater protection to speech and conduct than does its federal counterpart, the First Amendment." *Id.* at 283. Of course, Article I, Section 7 has no relevance here.

> in the judgments on the narrowest grounds."

In *Barnes*, this Court addressed a challenge to the federal constitutionality of an Indiana public indecency statute which facially prohibited the conduct of public nudity across the board, *see Barnes*, 501 U.S. 569, n. 2, but which previously had been given a narrowing construction by the Indiana Supreme Court to exempt "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *Barnes*, 501 U.S. 569, n.1 (quoting *State v. Baysinger*, 272 Ind. 236, 247, 397 N.E. 2d 580, 587 (1979)). The lawsuit was brought by two establishments wishing to offer totally nude dancing as entertainment, and individual dancers who were employed at those establishments. They asserted that the First Amendment's Free Speech Clause precluded Indiana from enforcing its public indecency statute to prevent this form of dancing.

Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, stated at the forefront of the plurality opinion that "nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes*, 501 U.S. 566. Accordingly, in order to determine "the level of protection to be afforded to the expressive conduct at issue," the opinion analyzed the statute under the four-part test first set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) for judging the constitutionality of a law regulating conduct containing both "speech" and "nonspeech" elements. *Barnes*, 501 U.S. at 566.

The *O'Brien* test may be summarized as follows:

> . . . [A] governmental regulation is sufficiently justified if [1] it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression

> of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Barnes, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77).

According to the Chief Justice, the Indiana statute was "clearly" within the constitutional power of the State, thereby meeting the first *O'Brien* prong. *Barnes*, 501 U.S. at 567. The statute "further[ed] a substantial governmental interest in protecting order and morality," thus satisfying the second prong. *Id.* at 568-69. The purpose advanced by the statute was unrelated to the suppression of free expression because "[p]ublic nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity," thus complying with the third prong. *Id.* at 571. And "it is without cavil that the . . . statute is 'narrowly tailored'; Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose," thereby satisfying the fourth and final prong. *Id.* at 572.

Concurring in the judgment, Justice Scalia declared that the Indiana statute was "a general law regulating conduct and not specifically directed at expression, and [therefore] is not subject to First-Amendment scrutiny at all." *Id.* As a result, he stated that the statute only needed to survive rational basis review, not the intermediate standard of review used in *O'Brien* and by the plurality, in order to be valid under the Due Process Clause. *Id.* at 580. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973) (stating that unless laws "create suspect classifications or impinge upon constitutionally protected rights," it need only be shown that they bear "some rational relationship to a legitimate state purpose.") Justice Scalia concluded that the statute easily passed that test. *Id.*

Justice Souter also concurred in the decision to uphold the Indiana statute. *Id.* at 581-87. He, like the Chief Justice, opined that "the nude dancing at issue here is subject to a

degree of First Amendment protection" *id.* at 581, triggering an analysis under the four-part test outlined in *O'Brien*. *Id.* at 582. He too concluded that the statute met each prong of the *O'Brien* standard.

Regarding the first prong of *O'Brien*, it was "clear" to Justice Souter that the statute fell within the constitutional power of the State. *Id.* at 583. As for the third prong, the second to be discussed in a moment, he found that the statute was not aimed at the suppression of expression, but was "content neutral." *Id.* at 585-86. Concerning the fourth prong, he noted that "[d]ropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." *Id.* at 587.

The only legally significant distinction between the opinions of the Chief Justice and Justice Souter pertains to the second prong of the *O'Brien* test. While the plurality said society has a substantial interest in protecting order and morality through such a statute, Justice Souter reasoned that the government's "substantial interest in combating the secondary effects of adult entertainment establishments," including "prostitution, sexual assault, and other criminal activity, . . . is sufficient under *O'Brien* to justify the State's enforcement of the statute against the type of adult entertainment establishments here." *Id.* at 582-83. He pointed out that that interest had already been found sufficient to justify regulating adult entertainment in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, n. 34 (1976), and *California v. LaRue*, 409 U.S. 109, 111 (1972).

Because Justice Scalia concurred with the plurality on broader grounds than did Justice Souter, the analysis of Justice Souter as the narrow grounds is applied under *Marks*. The plurality opinion and Justice Scalia's concurring opinion are broad enough to encompass the standard Justice Souter articulated. The reverse is not true. Justice Souter's opinion is thus the common rationale underlying this Court's decision

in *Barnes*.[2]

Barnes was understood and explained by not only the concurring Justice of the Pennsylvania Supreme Court in *Pap's A.M.*, but also the three judge panel of the Commonwealth Court of Pennsylvania in reversing the decision of the Court of Common Pleas of Erie County declaring the Erie ordinance unconstitutional. *Pap's A.M. v. City of Erie*, 674 A. 2d 338 (Pa. Commw. Ct. 1996).

The concurring Justice in *Pap's A.M.* and the Commonwealth Court of Pennsylvania are not alone in their understanding of *Barnes*. Federal courts have routinely construed Justice Souter's concurrence under *Marks* as the narrowest opinion in *Barnes*. *See, e.g., J&B Entertainment, Inc. v. City of Jackson*, 152 F. 3d 362, 370 (5th Cir. 1998); *Farkas v. Miller*, 151 F. 3d 900, 904 (8th Cir. 1998); *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129, 134 (6th Cir. 1994); *International Eateries of America, Inc. v. Broward County*, 941 F. 2d 1157, 1160-61 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992); *SBC Enterprises, Inc., v. City of Burlington*, 892 F. Supp. 578, 582 (D. Vt. 1995); *Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641, 644 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996).

In applying the strict scrutiny standard of review to the Erie ordinance, the Supreme Court of Pennsylvania stood *Barnes* on its head, and disregarded that a five-Justice majority in *Barnes* had consciously declined to apply the strict scrutiny test to a legally indistinguishable statute.

In *Barnes*, all four opinions, including the dissent, accepted the premise that content-based scrutiny would apply if the Indiana statute had a purpose which was hostile to the

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[2]Occasionally, as happened with *Marks*, the plurality opinion *itself*, rather than a particular concurring opinion, may express "the narrowest grounds" for the result reached by a majority of this Court, and therefore constitute the holding.

communicative impact of public nudity. However, the majority of Justices thought that the statute was not directed at the *communicative* effect of nudity, but at the *conduct* of being nude. *See Barnes*, 501 U.S. at 571-72 (Rehnquist, C.J., plurality opinion) (determining that statute was aimed at conduct, not communicative impact, and upholding it under the intermediate scrutiny of *O'Brien*); *id.* at 579-80 (Scalia, J., concurring) (same, but rejecting applicability of *O'Brien* and upholding statute under rational basis review); *id.* at 586 (Souter, J., concurring) (stating that statute was aimed to curb such "secondary effects" as "prostitution and sexual assault," and upholding statute under intermediate scrutiny).

Justice Souter made the following key observation in *Barnes* regarding the third *O'Brien* prong:

> The third *O'Brien* condition is that the governmental interest be "unrelated to the suppression of free expression," 391 U.S. at 377, and, on its face, the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression. . . .
>
> *Because the State's interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression.* . . . [T]he "secondary effects" justification [here] means that enforcement of the Indiana statute against nude dancing is "justified without reference to the content of the regulated [expression]," *ibid.* (emphasis omitted), which is sufficient, at least in the context of sexually explicit expression, [footnote omitted] to satisfy the third prong of the *O'Brien* test.

Barnes, 501 U.S. at 585-86 (emphasis added).

Although the majority of the Supreme Court of

Pennsylvania "acknowledged" in *Pap's A.M.* that a "stated purpose" of the Erie ordinance was "to combat negative secondary effects" of nude live entertainment, it proceeded to venture that "an unmentioned purpose" that was "inextricably linked" with this express purpose was "to impact negatively on the erotic message of the dance." *Pap's A.M.*, 719 A. 2d at 278-79. In other words, based upon this phantom illicit motive on the part of the City of Erie, the majority surmised that the Erie ordinance is not content neutral. Having so found, the majority, not surprisingly, reached "the inescapable conclusion" that the Erie ordinance did not pass the strict scrutiny review applicable to content-based regulations because it was not "narrowly tailored" to meet the admittedly compelling state interest of curbing sex crimes, such as prostitution and rape. *Pap's A.M.*, 719 A. 2d at 280.

Regarding the Pennsylvania Supreme Court's improper reliance on "an [illicit] unmentioned purpose" behind passage of the Erie ordinance, Justice Souter's following comment from *Barnes* is noteworthy:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. *Cf. McGowan v. Maryland*, 366 U.S. 420 (1961). At least as to the regulation of conduct [footnote omitted], "[w]e decline to void [a statute] essentially on the ground that it is unwise legislation which [the legislature] had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 391 U.S. at 384.

Barnes, 501 U.S. at 582-83.

Stated this Court in *O'Brien*: "It is a familiar principle of constitutional law that this Court will not strike down an

otherwise constitutional statute on the basis of an alleged illicit motive." *O'Brien*, 391 U.S. at 383. *See also Palmer v. Thompson*, 403 U.S. 217, 225-26 (1971); and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977).

The *Barnes* Court upheld the Indiana public indecency statute despite the fact that it was enacted by the state legislature *without* an express finding that nude barrooms and strippers cause secondary adverse effects. Because it is established under *Barnes* and other cases decided by this Court that adverse secondary effects of proscribed conduct may be considered by a court in evaluating the governmental interests justifying impingement upon protected expression even where, as in *Barnes*, no legislative history demonstrates that the legislators actually considered such secondary effects in adopting the challenged law, it is rather curious, to say the least, why a provision of the Erie ordinance *expressly* declaring that the purpose of the Erie ordinance is to combat negative secondary effects of nude stripper bars was deemed legally insignificant by the majority of the Supreme Court of Pennsylvania in *Pap's A.M.*

The majority of the Supreme Court of Pennsylvania clearly erred in trying to explain away *Barnes* as controlling precedent regarding the issue of whether the "strikingly similar" Erie ordinance violates the Free Speech Clause of the First Amendment to the United States Constitution, and in applying the strict scrutiny standard of review to invalidate Sections 1(c) and 2 of the Erie ordinance.

Accordingly, Orange County respectfully requests that this Court should grant a writ of certiorari, and quash the

Supreme Court of Pennsylvania's decision.[3]

[3] Orange County notes that, although it held the Erie ordinance violated Respondent's freedom of expression as protected under the First Amendment, the Supreme Court of Pennsylvania expressly declined to address Respondent's overbreadth challenge. *Pap's A.M.*, 719 A. 2d at 281, n. 12.

While the Supreme Court of Pennsylvania opted not to address the overbreadth claim below, the Commonwealth Court of Pennsylvania did, specifically and properly holding that any overbreadth is neither "substantial" nor "real," given that the City of Erie's public indecency ordinance contains a provision expressly limiting its reach, *see* Section 6 of Ordinance 75-1994 ("... the provisions of this ordinance [shall] be construed, enforced and interpreted in such a manner as will cause the least possible infringement of the constitutional rights of free speech, free expression, due process, ..."), and that it is undisputed that a performance of "Equus" occurred at a theatre in the City of Erie after the City of Erie enacted the ordinance, apparently without incident. *Pap's A.M., 674 A.2d at 345-46.*

Nevertheless, because the Pennsylvania Supreme Court did not reach the question, Orange County submits that the overbreadth challenge need not be visited by this Court.

II. NUDE ACTIVITY AT AN ADULT ESTABLISHMENT, INCLUDING "DANCING" OR "PERFORMING," SHOULD NOT AUTOMATICALLY BE CONSIDERED PROTECTED NON-VERBAL EXPRESSION UNDER THE FIRST AMENDMENT

In *O'Brien*, Chief Justice Warren stated for this Court: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. 367, 376 (1968).

A decade ago, this Court likewise remarked as follows in *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989):

> It is possible to find some kernel of expression in almost every activity a person undertakes - for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

Clearly, restricting "speech" to just the spoken or written word is not a realistic view of how people communicate with one another. In many ways, nonverbal communication is speech. Much nonverbal conduct can communicate as effectively as the spoken or written word, if not more. As a result, a realistic definition of "speech" should encompass nonverbal conduct and symbols that are equivalent to verbal and written speech.

In *Spence v. Washington*, 418 U.S. 405 (1974), this Court enunciated the following two-part test in determining when nonverbal action or conduct is the equivalent of speech for purposes of the First Amendment: (1) whether there was "[a]n intent to convey a particularized message"; and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who

viewed it." *Id.* at 410-11.

In *Spence*, the defendant was convicted of violating a so-called "improper use" statute, forbidding the superimposition of any advertising or other extraneous matter onto a flag. He had taped peace symbols to both sides of a privately-owned United States flag in reaction to the United States invasion of Cambodia and the killing of several students at Kent State University by the National Guard, and displayed the flag upside down from his apartment window. The peace symbols were about half the size of the flag surface, and the flag was plainly visible to passersby.

Because the defendant "did not choose to articulate his views through printed or spoken words," this Court decided in *Spence* that it was necessary to determine "whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Id.* at 409. Reviewing the defendant's conduct under the foregoing factors, this Court pointed out that "his message was direct, [and] likely to be understood." *Id.* at 415. Thus, it determined that the conduct at issue was the equivalent of protected speech, and invalidated the conviction.

This Court applied the *Spence* criteria fifteen years later in *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There, the defendant was convicted of violating a statute prohibiting the desecration of a venerated object. He had burned a U.S. flag in front of the Dallas City Hall in conjunction with a political demonstration during the 1984 Republican National Convention. This Court held that, under the circumstances, the defendant's act of burning the flag satisfied the *Spence* test, and overturned the conviction.

This Court noted in *Texas v. Johnson* that the same basic criteria described in *Spence* had been utilized by this Court in recognizing other conduct as nonverbal expression, including the wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505

(1969); a sit-in by African-Americans in a "whites only" library to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); and the wearing of American military uniforms in a dramatic presentation criticizing United States involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970).

Unfortunately, besides *Texas v. Johnson*, the *Spence* factors have not been applied in other cases where this Court has tackled the issue of whether a particular asserted nonverbal communication constituted "speech," including *Barnes*. *See also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289-300 (1984) (majority), *but see* 468 U.S. at 304-05 (Marshall, J., dissenting); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Stanglin.*

Speech, in whatever form, except for certain defined exceptions (*e.g.* obscenity, fighting words, child pornography), is protected under the First Amendment if it is equivalent to communication. *See, e.g., Texas v. Johnson*; *Spence; West Virginia State Bd of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (declaring that "symbolism is a primitive but effective way of communicating ideas"); *Cohen v. California*, 403 U.S. 15, 18 (1971) (stating that the *O'Brien* test was inapplicable because the only "conduct" which California sought to punish was "the fact of communication").

Commentators share this view. *See* Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 493 (1984) (remarking that courts should examine the "likelihood that the act was intended to be communicative, and will be understood to be so"); Louis Henkin, *On Drawing Lines*, 82 HARV.L.REV. 63, 79-80 (1968). ("The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is 'speech.'").

So when does a particular *nonverbal act* actually

communicate? In order for nonverbal conduct to be the equivalent of speech, the actor must at least intend to send information or a message, and the information or message must have a meaning. *See Spence*, 418 U.S. at 410-11. *See also* Paul Ekman & Wallace Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding*, SEMIOTICA 49, 55-56 ("Communicative nonverbal behavior encompasses those acts which are clearly and consciously intended by the sender to transmit a specifiable message to the receiver.") If someone intends to send a message through nonverbal conduct, it should have an identifiable meaning; otherwise, no message can hope to be communicated or understood.

Perhaps in light of the fact that the actor's subjective "intent" is sometimes difficult to ascertain, this Court looked in *Spence* to not only whether the actor intended to communicate a message, but also whether the message was likely to be comprehended by those who viewed it.

So what of nude barroom "dancing?" Orange County recognizes that eight Justices indicated in *Barnes* that nude barroom "dancing" is expressive to some degree. (Rehnquist, C.J., plurality) (. . . "nude dancing of the kind sought to be performed here is expressive conduct *within the outer perimeters* of the First Amendment, *though we view it as only marginally so.*") *Barnes*, 501 U.S. at 566 (emphasis added); (Souter, J., concurring) (". . . the nude dancing at issue is subject to *a degree* of First Amendment protection.") *Barnes*, 501 U.S. at 581 (emphasis added); (White, J., dissenting) ("[o]ur prior decisions permit no other conclusion.") *Barnes*, 501 U.S. at 587.

The dissent commented in *Barnes* that dance "is the communication of emotion or ideas." *Barnes*, 501 U.S. at 587, n. 1. Even if a nude barroom "dancer" genuinely intends to convey such a subliminal message, that is only the half of it under *Spence*. Is her (or his) message understood?

The dissent in *Barnes* also quoted with approval from the French poet Stéphane Mallarmé, who stated that the dancer

"writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose." *Id.* But is suggestion the same thing as communication? If a woman wears "suggestive" clothing, does she intend to tell the interested observer that she is available for sex? An interested observer may draw such an inference, but such an inference does not mean that the wearer intended that the observer receive such a message.

In the area of freedom of speech, certainly "the courts must always remain sensitive to any infringement on *genuinely serious* literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 22-23 (1973) (emphasis added). But nude barroom "dancing," the term "dancing" being a generous euphemism for the variety of nude activity which takes place at such establishments, does not express any genuinely serious political, sociological, educational, religious, cultural or artistic viewpoint or message. *Cf. Rathert v. Village of Peotone*, 903 F. 2d 510, 517 (7th Cir.) *cert. denied*, 498 U.S. 921 (1990) (prohibition against police officers wearing ear studs off duty upheld; ear studs convey no cultural political, sociological, religious or educational message.)

It simply assumes too much to surmise that whenever and wherever a worker appears nude before an audience at an adult establishment, such worker engages in expressive conduct as a matter of law. Under such an assumption, the idea of communication becomes meaningless. It is no different than concluding that nude dancers are constantly communicating a message, whether they intend to or not. Such activity does not as a rule constitute protected expression or inherently satisfy the *Spence* criteria used for ascertaining whether activity is nonverbal expression.

Instead of assuming that women (or men) communicate eroticism, sexuality, sensuality or some other remotely identifiable message simply by virtue of their appearing nude at an adult establishment, it should be presumed that nude barroom "dancing" is non-expressive conduct performed purely for functional reasons.

The reality of the situation is that although women (or men) choose to appear nude before an audience in an adult establishment for a multitude of personal reasons, the underlying, common thread is most probably nothing more than a utilitarian desire to earn compensation in exchange. How else does one explain why a nude barroom "dancer's" inferential message of "eroticism," "sexuality" or "sensuality" is directly proportional to the amount of tips she (or he) receives from patrons? Her (or his) conduct is obviously a functional activity in that it is done for pecuniary gain.[4]

When the conduct of being nude is a guise or pretense utilized to exploit nudity for profit or commercial gain, such as happens in an adult establishment, as opposed to a part of a bona fide live communication, demonstration or performance by such person wherein the nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or expression, it should not be deemed nonverbal expression protected under the Free Speech Clause of the First Amendment.

At the very least, the issue of whether a worker at an adult establishment engaged in expressive conduct when she (or he) appeared nude is one which should be resolved by employing the *Spence* test. The fair questions to be asked are whether such worker intended to communicate a particular message, and if so, whether the message was likely to be understood by the audience.

---

[4] Insofar as nude barroom "dancers" may assert that they "dance" nude as a political protest, or as a form of civil disobedience, Justice Scalia noted in *Barnes* that "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose---if only expressive of the fact that the actor disagrees with the prohibition." 501 U.S. at 576 (Scalia, J., concurring) (emphasis in original). Anyone who asserts that his or her violation of a law is a protest against that law should remember that "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest." *Cox v. Louisiana*, 379 U.S. 536, 545 (1964).

In answering those questions, it should not be forgotten that, according to *Spence* and *Texas v. Johnson*, the context and circumstances surrounding the conduct should be examined. In other words, did the worker actually intend during her (or his) nude exhibition to send some bona fide message as opposed to exploit nudity for commercial gain? In all candor, Orange County doubts whether nude barroom "dancers" intend to express any particular message at all.

In answering the foregoing questions, neither should it be lost that "[c]onduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live theater stage.'" *Paris Adult Theatre Inc. v. Slaton*, 413 U.S. 49, 67 (1973).

Nude barroom "dancing" should not be automatically deemed protected expression, or even marginally protected expression, but should be presumed to be conduct until shown otherwise under *Spence*.

CONCLUSION

Based on the foregoing reasons, *amicus* contends that the Supreme Court of Pennsylvania erred in disregarding binding precedent in *Barnes* in holding that Sections 1(c) and 2 of the City of Erie public indecency ordinance infringe the Free Speech Clause of the First Amendment.

Amicus further asserts that nude conduct in an adult establishment does not constitute protected nonverbal expression as a matter of law. Rather, such conduct should be presumed unprotected. When a claim is made that such conduct is protected expression, the *Spence* test should be utilized in determining whether the "activity was sufficently imbued with elements of communication to fall within the scope of the First Amendment," *Spence*, 418 U.S. at 409, or whether instead it was merely a guise or pretense utilized to exploit nudity for profit or commercial gain.

Respectfully submitted,

By: Arthur Bryant by Applegate/jor
Joel D. Prinsell
Senior Assistant County Attorney

August 20, 1999

CERTIFICATE OF SERVICE

I, Joel D. Prinsell, hereby certify that three copies of the foregoing Brief of Amicus Curiae, Orange County, Florida, were served this 20th day of August 1999, by priority mail, postage prepaid, to the following persons at the addresses listed below:

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Orange County, Florida, by
Mel Martinez, as County Chairman
for Orange County, Florida

APPENDIX

Sec. 26-26. Public nudity.

(a) *Title.* This section shall be known as the "Orange County Public Nudity Ordinance."

(b) *Intent.* It is the intent of this section to protect and preserve the health, safety and welfare of the people of Orange County by prohibiting any person from knowingly or intentionally appearing nude in a public place, or knowingly or intentionally causing or permitting another person to appear nude in a public place, within the unincorporated area of Orange County, subject to the following three (3) exceptions:

(1) When such person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____ 111 S.Ct.

2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(c) *Findings.* The board of county commissioners finds and determines as follows:

(1) Since the beginning of civilization, appearing nude in a public place which is not a public place provided or set apart for nudity has been considered improper (see *Moffet v. State*, 340 So. 2d 1155, 1156, n. 3 (Fla. 1977), which quotes Genesis 3:7 (King James)); and

(2) Appearing nude in a public place which was not a public place provided or set apart for nudity was a criminal offense at common law and was considered an act *malum en se* (wrong in itself); and

(3) Appearing nude in a public place which is not a public place provided or set apart for nudity is engaging in conduct which often serves to impose such person's nudity on others who did not seek it out, who are not able to reasonably avoid observing it, and who may be offended or distressed thereby; and

(4) Appearing nude in a public place which is not a public place provided or set apart for nudity is still subject to general disapproval by the people of Orange County; and

(5) The appearance of persons in the nude in public places which are not public places provided or set apart for nudity generally increases incidents of prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values; and

(6) Without regulation, appearing nude in a public place which is not a public place provided or set apart for nudity constitutes harmful conduct; and

(7) Orange County is a family oriented area; and

(8) Orange County is an area that is known for and whose economy is largely dependent upon its popular tourist and family oriented attractions, such as the Magic Kingdom, EPCOT Center, Sea World, Disney-MGM Studios, Universal Studios; and

(9) Regulation of public nudity will protect and preserve the public health, safety and welfare of the people of Orange County by restricting, to the fullest extent allowed by the United States Constitution and Florida Constitution, the act of being nude to nonpublic places or public places provided or set aside for nudity; and

(10) Nonregulation of persons appearing nude in public places which are not public places provided or set apart for nudity within the unincorporated area of Orange County would

encourage entities and persons to exploit nudity for profit or commercial gain and to advertise outside of Orange County and the State of Florida the availability of and opportunity for nudity in public places which are not places provided or set apart for nudity within the unincorporated area of Orange County, and thus would encourage the influx into the unincorporated area of Orange County of persons seeking to observe and/or participate in such nudity, and to participate in the disorderly, harmful and illegal conduct that is associated therewith, thereby increasing injuries and damages to the people of the unincorporated area of Orange County who will be the victims of such increased disorderly, harmful and unlawful conduct; and

(11) The prohibitions contained herein are the most reasonable and minimum restrictions required so as to regulate conduct which is adverse to public order within the unincorporated area of Orange County, when such conduct occurs in a public place which is not a public place provided or set apart for nudity; and

(12) States may regulate the conduct of appearing nude in places which are not public places provided or set apart for nudity (see *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)); and

(13) The exemptions contained in this section provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this section from exercising

constitutionally protected rights; and

(14) This section regulates conduct, not speech.

(d) *Definitions.*

(1) *Entity* means any proprietorship, partnership, corporation, association, business trust, joint venture, joint-stock company or other for profit and/or not for profit organization.

(2) *Nude* means to display or expose the male or female genitals, pubic area or the female breast with less than a fully opaque covering of any part of the areola and nipple, or the showing of the covered male genitals in a discernibly turgid state. For purposes of this definition, body paint, body dye, a tattoo, latex, or any similar substances shall not be considered an "opaque covering."

(3) *Person* means any human being at least ten (10) years of age.

(4) *Public place provided or set apart for nudity* means an enclosed public restroom, an enclosed functional shower or locker room facility, an enclosed sauna, a motel room or hotel room designed and intended for sleeping accommodations, or at the location of a bona fide private club whose membership as a whole engages in social nudism or naturalism (a nudist resort or camp), and any similar public places in which nudity is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein.

(5) *Public place* means any location open to the common and general use, participation or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes, but is not limited to, a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not for profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, cabaret, or meeting facility utilized by a religious, social, fraternal or similar organization.

(e) *Public nudity.* Subject to the exemptions set forth in subsection (f) below, it shall be unlawful for any person to knowingly or intentionally appear nude in a public place, or to knowingly or intentionally cause or permit another person to appear nude in a public place.

(f) *Exemptions.* The offense of public nudity contrary to subsection (e) above shall not occur in any of the following three (3) instances:

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or

entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example *Barnes v. Glen Theatre, Inc.*, ____ U.S. ____, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); and *Hoffman v. Carson*, 250 So. 2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or Florida Constitution.

(g) *Violation of subsection (e).* Whoever violates subsection (e) above may be punished as provided in section 1-9 of the Orange County Code.

MOTION FILED
JUN 30 1999

(15)

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

CITY OF ERIE, PA., *et al.*,
Petitioners,

v.

PAP'S A.M.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION OF ORANGE COUNTY, FLORIDA, BY THE HONORABLE MEL MARTINEZ, AS COUNTY CHAIRMAN FOR ORANGE COUNTY, FLORIDA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS, FOR LEAVE OF COURT TO FILE UNTIMELY SERVED BRIEF

JOEL D. PRINSELL
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5 pp

MOTION

Pursuant to Rule 21 of the Rules of the Supreme Court of the United States, Orange County, Florida, files this motion requesting this Court to accept for filing the *amicus curiae* brief in support of Petitioners that it untimely served on August 20, 1999.

Orange County served a 21-page *amicus curiae* brief by priority mail on Friday, August 20, 1999, with the Clerk of this Court, counsel of record for the parties, and *amicus curiae* Morality in Media, Inc. It did so pursuant to Rule 37.4 allowing such briefs to be filed without leave when submitted on behalf of a county by its authorized law officer.

The undersigned attorney understands that, as he expected, the brief was received by the Clerk of this Court, the parties, and the other *amicus* on Monday, August 23, 1999.

Late in the afternoon on Tuesday, August 24, 1999, the Office of the Clerk of this Court informed the undersigned attorney by voicemail that Orange County's *amicus curiae* brief had not been timely filed, but was seven (7) days late.

The Office of the Clerk of this Court simultaneously advised the undersigned counsel that if Orange County wished to have this Court consider accepting the untimely filed *amicus curiae* brief, it would have to submit a motion seeking such relief, and that such motion would have to be prepared in the format described under Rule 33.1 for the filing of *amicus curiae* briefs submitted in support of Petitioners. That is the purpose of this motion.

At the outset,Orange County apologizes for any inconvenience that it may have caused this Court or the Clerk of this Court by not timely filing the *amicus curiae* brief.

Orange County, which did not learn that this case was pending before this Court until August 1999, had been led to believe that the due date for filing its *amicus curiae* brief on behalf of Petitioners was August 23, 1999.

The undersigned attorney recognizes that he is solely

responsible and at fault for not timely filing the *amicus curiae* brief. The undersigned attorney understands that, rather than relying upon the word of a third party, he should have contacted the Clerk of this Court to determine the due date for filing an *amicus curiae* brief on behalf of Petitioners.

Nevertheless, for the foregoing reasons, Orange County respectfully requests that it be permitted to file the *amicus curiae* brief that it untimely served in support of Petitioners on August 20, 1999.

Yesterday, the undersigned counsel contacted counsel of record for the parties, *including for the Respondent*, about this matter, and counsel of record, *including for the Respondent*, have informed the undersigned attorney that they do not have an objection to Orange County filing an *amicus curiae* brief, even though it was not timely served.

Furthermore, Orange County understands from counsel of record for the Respondent that Respondent's brief is not due to be filed with this Court until on or about September 30, 1999, approximately just over a month from today, and therefore submits that Respondent will have an adequate opportunity to reply to Orange County's *amicus curiae* brief (assuming that Respondent believes that a reply is even necessary or warranted).

Orange County, which as noted above prepared its *amicus curiae* brief pursuant to Rule 37.4, is a body corporate and politic existing under the laws of the State of Florida and the Orange County Charter. The Honorable Mel Martinez is the duly elected County Chairman for Orange County under the Orange County Charter. Pursuant to the Orange County Charter, the County Chairman is the chief executive of Orange County, with the authority to assure the faithful execution of all Orange County ordinances, resolutions and orders, and to ensure that they are enforced.

Orange County filed its *amicus curiae* brief in support of Petitioners because it is presently defending against a challenge in federal court to the constitutionality of an Orange County public nudity ordinance similar to the City of Erie public indecency ordinance which is the subject of the certiorari

proceeding pending before this Court. (Orange County's ordinance was adopted by the Orange County Board of County Commissioners by Ordinance No. 92-33 on October 28, 1992, and is codified at Section 26-26 of the Orange County Code. In the event this Court would like to review the ordinance, a copy is attached to the *amicus curiae* brief as an Appendix.)

The federal lawsuit against Orange County has been brought in the Middle District Court for Florida in a case styled *Kim Gatena v. Orange County, Florida*, Case No. 98-417-CIV-ORL-22B. The Honorable Anne C. Conway, District Judge, is presiding. Like a majority of the Supreme Court of Pennsylvania declared in *Pap's A.M. v. City of Erie*, 553 Pa. 348, 719 A. 2d 273 (1998), Ms. Gatena is asserting, in part, that *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), a plurality opinion where this Court upheld the federal constitutionality of a nearly identical Indiana public indecency statute, is not binding precedent.

Orange County, being faced through its County Chairman with the duty of executing and enforcing the laws of Orange County, Florida, and the burden of defending against such federal lawsuits, has a keen interest in the resolution of the issue of whether a public nudity law along the lines of the City of Erie's passes constitutional muster.

Orange County believes that its *amicus curiae* brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

Again, Orange County apologizes for any inconvenience that it may have caused this Court by the untimely service of the subject *amicus curiae* brief.

CONCLUSION

Based on the foregoing reasons, Orange County respectfully requests that the Clerk of this Court be permitted to accept for filing the *amicus curiae* brief that Orange County untimely served in support of Petitioners on August 20, 1999.

Respectfully submitted,

By: Joel D. Prinsell
Joel D. Prinsell
Senior Assistant County Attorney

August 27, 1999

FILED
SEP 30 1999
OFFICE OF THE CLERK

No. 98-1161
In the

Supreme Court of the United States

October Term, 1999

THE CITY OF ERIE, et al.,

PETITIONERS

v.

PAP'S A.M.,

RESPONDENT

ON APPEAL FROM THE
SUPREME COURT OF PENNSYLVANIA

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR PROTECTION OF FREE EXPRESSION, ALLEY THEATRE, ASSOCIATION OF PERFORMING ARTS PRESENTERS, KATHLEEN CHALFANT, DANCE/USA, TONY KUSHNER, THE LOOKINGGLASS THEATRE CO., TERRENCE MCNALLY, OREGON SHAKESPEARE COMPANY, YVONNE RAINER, RACHEL ROSENTHAL, THEATER ARTAUD, THEATRE COMMUNICATIONS GROUP, AND THE WALKER ART CENTER

In support of Respondent

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BEST AVAILABLE COPY

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of freedom of speech and press form threats of different forms. The Center pursues that mission in several ways, notably by filing amicus curiae briefs in cases that raise important free expression issues.

Founded in 1947, the Alley Theatre of Houston, Texas, has established itself as one the country's leading professional resident theater companies, and was awarded the 1996 Tony award for Outstanding Regional Theater. The Alley's productions have been featured in over forty cities across the United States as well as in Paris and Venice. In 1999, three Alley productions ran simultaneously on Broadway, *Jekyll & Hyde*, *The Civil War*, and *Not About Nightingales*. The Alley has also produced works in collaboration with The Moving Theatre of London and the Royal National Theatre. The Alley has presented numerous works that included nudity, including its 1999 production of Tom Stoppard's *Travesties*, its 1996 staging of amicus curiae Terrence McNally's *Love! Valour! Compassion!* and its 1995 production of amicus curiae Tony Kushner's *Angels in America: Parts 1 and 2* (which the

[1]Written consent of all parties to the filing of this brief has been filed with the Clerk of Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

Alley presented at the Venice Biennale). Moreover, the Alley premiered Kushner's *Hydriotaphia* which included a character in a body suit that may be considered nudity under the Erie ordinance. The Alley has an interest in continuing to present acclaimed works that contain nudity including its production of Margaret Edson's *Wit*, a play discussed further herein, scheduled for this coming season.

The Association of Performing Arts Presenters is a national association of performing arts presenters, touring artists, and artists' managers. Founded in 1956, Arts Presenters has a membership of approximately 1500 organizations dedicated to bringing audiences and artists together. Thirty percent of its presenting organization members reside on university campuses and have long histories of dealing with freedom of expression and academic freedom issues. Arts Presenters seeks the inclusion of varied experiences in the belief that such pluralism leads to continued exploration and discovery which benefits both our membership and society. They welcome a broad cross-section of organizations and artists some of which have created and presented high quality dance and theater works that include nudity. In these performances, nudity is an aesthetic statement that adds to or reinforces the meaning of the work. This inclusive dynamic implies tolerance and respect for those with differing priorities and underscores the primacy of original thought. Arts Presenters commitment to freedom of expression flows directly from these deeply held convictions.

Kathleen Chalfant is an acclaimed stage actress who has worked widely on the New York stage. From 1997 to 1999, she appeared in the Off-Broadway production of Margaret Edson's *Wit*. In the play's final scene, described more fully herein, Ms. Chalfant appeared fully nude. For her performance, Ms. Chalfant won numerous Best Actress awards including the Obie, Drama Desk, Outer Critics Circle, Lucille Lortel, and Connecticut Critics awards. Ms. Chalfant also appeared on Broadway in amicus Kushner's *Angels in America* plays, each of which requires some nudity. Ms. Chalfant has an interest in continuing to perform in such productions and in ensuring that these Pulitzer Prize winning plays be performed as their authors intended.

Dance/USA is a national service organization whose purpose and mission is to advance the artform of dance. Founded in 1982, Dance/USA's membership currently includes over 250 ballet, modern, ethnic, jazz, culturally specific, traditional and tap companies, dance service organizations, presenters and individuals. Dance/USA's role is to speak as a united, national voice for the profession. Among Dance/USA's primary goals is to encourage greater knowledge, appreciation and support of the dance artform and to that end it provides forums for the discussion of significant artistic, administrative, governance, educational, audience and funding issues in dance. The members of Dance/USA share a fundamental belief that dance in all its great diversity is integral to all aspects of a healthy society and to the growth and development

of every individual. Dance/USA believes that a healthy society is one in which the many forms and expression in movement and dance are distinguished, understood and valued by all and that there is a basic right to self expression. In order to ensure the health of the dance field, Dance/USA seeks to encourage a lively exchange of performance and ideas, analysis and introspection, criticism and debate, and a free and open dialogue on dance. At times this expression, through the presentation of works of dance, includes the use of nudity. It is the organization's belief that those in the not-for-profit professional dance field utilize nudity from time to time within their creative work as an integral part of choreography when it is central to the content of the work being presented to the public.

Tony Kushner is a playwright best known for his seven-hour, two-part, Broadway production of *Angels in America: A Gay Fantasia on National Themes*, which received a Pulitzer Prize, two Tony Awards, two Drama Desk Awards, the Evening Standard Award, two Olivier Award Nominations, the New York Critics Circle Award, and the Los Angeles Drama Critics Circle Award. In late 1998 London's Royal National Theatre selected Angels in America as one of the ten best plays of the 20th century. Nudity plays an essential role in the plays, and has been included in productions around the country. His other plays include *Hydriotaphia, A Bright Room Called Day, Slavs!: Thinking About the Longstanding Problems of Virtue and Happiness*, and adaptations of Goethe's *Stella*, Brecht's *The Good Person of*

Setzuan, Ansky's *The Dybbuk*, and Corneille's *The Illusion*. In addition, Kushner has received grants from the New York State Council on the Arts, the NEA, the Whiting Foundation, and the American Academy of Arts and Letters.

The Lookingglass Theatre Company, based in Chicago, Illinois, was founded in 1988 by a group of graduates of Northwestern University. The company seeks to redefine the limits of theatrical experience and to make theater exhilarating, inspirational, and accessible to all. The company, which performs to approximately 25,000 patrons each year, has received 26 Joseph Jefferson citations for its works, and its works from the past season have been nominated for 12 more. Its ensemble includes actor David Schwimmer and playwright Mary Zimmerman, who has received a MacArthur fellowship for her work. The Lookingglass has in the recent past presented several works that contained nudity including Zimmerman's adaptation of Ovid's Metamorphoses (in which Cupid, consistent with classical depictions, appears fully nude), Zimmerman's S/M, David Kershar's The Naked King, and Bruce Norris's Vanishing Twin. The Lookingglass also runs a youth ensemble program.

Terrence McNally is one of the leading contemporary American playwrights. He has won four Tony and numerous other awards for his playwrighting. His play *Love! Valour! Compassion!* recently won the 1995 Tony, Drama Desk and Outer Critics Circle Awards for Best Play as well as the New York Drama Critics'

Circle Award for Best Play. The play, which is performed frequently in non-profit and commercial theaters throughout the country, requires the male actors to appear nude. Another play, *The Lisbon Traviata*, also requires nudity, and is widely performed. In addition, several productions of his play *Frankie and Johnny in the Claire de Lune* have contained nudity. Mr. McNally has an interest that his works may continue to be performed as written. McNally has received two Guggenheim Fellowships, a Rockefeller Grant, a Lucille Lortel Award and a citation from the American Academy of Arts and Letters. He has served as vice-president of the Dramatists Guild.

Established in 1935, the Oregon Shakespeare Festival is among the oldest and largest professional regional theater companies in the United States. In 1997, it reached a total audience of 364,602, the highest of any non-profit theater in the nation. OSF received the 1983 Tony Award for Outstanding Regional Theater and the 1983 national Governors' Association Award for distinguished service to the arts. Each season the Festival presents 11 works in three theaters in Ashland, Oregon, five by Shakespeare and six by classic and contemporary playwrights. The Festival has an interest in preserving its constitutional right to present works that include nudity. It has presented such works in the past including its 1997 production of David Edgar's *Pentecost*, its 1987 production of Sam Shepard's *Curse of the Starving Class*, and two productions of Shakespeare's *Measure for Measure*, one in 1986 and one in 1977.

Yvonne Rainer is a noted choreographer, performer and filmmaker who co-founded the highly influential Judson dance theater movement in the 1960s. This movement has proved to be a vital force in modern dance. Between 1962 and 1975 she presented her choreography throughout the United States and Europe, notably on Broadway in 1969, in Scandinavia, London, Germany, and Italy between 1964 and 1972, and at the Festival D'Auomne in Paris in 1972. In 1963 Rainer collaborated on a dance with the choreographer Steve Paxton to be performed at the Judson Memorial Church in New York. After much consideration the choreographers decided that the costuming would be nudity. The choreographers believed that in exposing the human body in a non-erotic context Rainer hoped to remove the social stigmas of repression, shame, and voyeuristic secrecy. Rainer performed the piece again in 1970 at the Judson's People's Flag Show, and it was revived again for a 1999 performance. In each case, the church fully supported her efforts to expand and challenge current notions of decency and decorum. In 1990 Rainer received a MacArthur fellowship for her contributions to the arts.

Rachel Rosenthal is an acclaimed performance artist who has been honored with numerous awards and fellowships including those from the Rockefeller and Getty Foundations, the National Endowment for the Arts, The United States Information Agency, and the California Arts Council Organization. She has been granted an Honorary Doctorate from the School of the Art Institute of

Chicago for her contributions to performance art. Ms. Rosenthal has used nudity in several works, most recently in her 1996 piece *Timepiece*. The piece, which tied in issues of human victimization with the plunder of the environment, featured three artists, nude, first walking in the background of a dramatic monologue about the Holocaust and then representing the life cycle of trees. The scene's expressive power would have been greatly diminished and its message altered had the artists been clothed. *Timepiece* was performed extensively including at Cal State University Los Angeles; Cantabile 2/Waves Festival, Vordingborg, Denmark; UC Santa Barbara; Harrison Opera House, Norfolk VA; UA Presents, University of Arizona, Tucson; the Dance Center of Columbia College in Chicago; and will be presented this coming October at Evergreen State College, Olympia WA.

Since its inception in 1972 as one of the first live-work art projects in the country, supporting the vision and development of contemporary performing artists has been central to the mission of Theater Artaud. Over the years, the profile of artists who have performed in the venue has been varied, but all were creating new work that was socially vital and that crossed the boundaries of form, discipline, assumption and convention - challenging conventional expectations. Within this artistic context, the use of partial and/or full nudity, as well as the implicit suggestion of nudity, often played a central role. Nationally-acclaimed artists/companies who incorporated the use of nudity into their

performances at Theater Artaud in the past include performance artist Karen Finley and the theater company Contraband.

Theatre Communications Group, the national service organization for the not-for-profit theater in America, currently claims a membership of more than 350 theaters in 44 states. Their mission of strengthening, promoting and nurturing the American theater, leads them to firmly support freedom of expression in the pursuit of art in general and theater in particular. TCG seeks to protect its members' right to the fullest range of free artistic expression, including nudity where required.

The Walker Art Center of Minneapolis, Minnesota, opened in 1927 as a visual arts museum and began presenting the performing arts in the 1940s. The Walker now houses the largest museum-based performing arts department in the country, presenting hundreds of local, national, and international contemporary artists each year. The Walker introduces new artists to the community while maintaining a commitment to contemporary masters. The Walker's Performing Arts Department has been the recipient of numerous awards, including the 1998 Quality of Life Award form the Minneapolis Chamber of Commerce. The Walker presents highly acclaimed artists from a variety of disciplines, including those who sometimes incorporate full or partial nudity as an integral artistic element of their work, such as theater artists the Wooster Group, Ping Chong, and Robert LePage and dance artists

Eiko & Komo, the Bill T. Jones/Arnie Zane Dance Company and Kim Itoh.

As the foregoing demonstrates, amici represent a variety of artists and organizations that have extensive knowledge and experience in the performing arts. Many of the facts asserted in the argument of this brief are drawn from the personal knowledge of amici.

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania correctly ruled that the expression involved in this case deserves First Amendment protection under the relevant judgments of this Court, including *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Clearly such expression falls within none of the narrow categories -- for example, incitement and fighting words -- which the First Amendment allows government to forbid or punish. Neither the entertainment context, nor the commercial setting in which it typically occurs, forfeits that constitutional protection.

Any suggestion that such an ordinance could be justified by treating nude expression as legally obscene would fail under *Miller v. California*, 413 U.S. 15 (1973) since its terms meet few if any of the rigorous conditions this Court has set for approval of obscenity legislation. Indeed, this Court has consistently recognized the presumptively protected status of mere nudity in art and entertainment, *Jenkins v. Georgia*, 418 U.S. 153 (1974), even where such performances may offend substantial parts of a community.

Moreover, the ordinance which the court below invalidated on First Amendment grounds would, by its terms, undoubtedly reach a broad range of recognized artistic expression, also involving nudity, the value of which is beyond dispute. Indeed, nudity plays a vital role in the performing arts, as myriad examples familiar to amici eloquently demonstrate. Whatever may have been the

immediate concern of those who drafted and enacted the challenged ordinance, there can be no doubt that its provisions forbid a substantial amount of recognized and acclaimed artistic endeavor. Such a broad and indiscriminate reach warrants the strictest scrutiny on this Court's part.

While holding in *Barnes* that some such expressive activity may be regulated, this Court imposed several vital conditions, which the Erie ordinance fails to meet. Under *Barnes*, only content-neutral laws may be invoked, and the goals they serve must be unrelated to the suppression of free expression. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (1991) (Souter, J., concurring). Yet Pennsylvania's highest court has ruled that the ordinance challenged here does not meet that test. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (1998). Specifically, the court below found that the ordinance is not content-neutral, but is in fact is clearly content-based, and that among its goals are "an unmentioned purpose that directly impacts on the freedom of expression: . . . to impact negatively on the erotic message of the dance." *Id.*

The court below also correctly ruled that, even if the ordinance were deemed content-neutral and served interests that were unrelated to the suppression of free expression, it is not narrowly tailored. *Id.* at 280. Characterizing the law as "highly circuitous," the court below identified at least one specific and less restrictive alternative that would equally well meet the city's needs. *Id.* Such a construction of state law, by the highest court of the

Commonwealth, places this ordinance in a posture wholly different from that of the local regulation this Court sustained in *Barnes*.

For these reasons, amici respectfully urge the affirmance of the judgment below.

ARGUMENT

I. THE EXPRESSION AT ISSUE IN THIS CASE IS CLEARLY ENTITLED TO FIRST AMENDMENT PROTECTION.

Artistic expression is as fully protected by the First Amendment as other forms of speech, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *see also Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The presence of nudity does not diminish that protection. At least since this Court's judgment in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), it has been clear that nudity does not deprive artistic expression of "First Amendment protections from official regulation." Indeed, that principle had almost certainly been settled several years earlier when, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975) this Court invalidated a city's denial of public space for the performance of a rock musical which, *inter alia*, included on-stage nudity. Other cases of that era also presupposed First Amendment protection for such expression. *See Doran v. Salem*

Inn, Inc., 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

The plurality opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991), did not diminish the protected status of such expression, by declaring that nude expression "of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." Any doubt on that score should be allayed by Justice Souter's concurring statement: "Thus I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of First Amendment protection." *Id.* at 581. Indeed, when one merges Justice Souter's view with those of the four dissenters, it seems quite clear that a majority of the *Barnes* Court would have granted broader protection than the plurality to nude expression or performances in that context. Suffice it to say, as did the court below, that the *Barnes* Court was unanimous in its view that the regulated expression fell within the scope of First Amendment speech.

The lower court's view of the First Amendment issue was sound for a different if related reason. This Court has consistently ruled that all expression is protected unless it falls within one of several narrow categories -- speech that incites to imminent lawless action, fighting words, obscenity, child pornography, defamation of a private individual, etc. Other kinds of speech that may find little favor in polite company, or may win few encomia from literary

critics -- "indecent" and "patently offensive" material on the Internet, most recently -- is nonetheless protected, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), if only because there is no constitutionally valid basis on which to deny protection. Indeed, even speech that is unprotected may not be restricted on the basis of an unpopular message or abhorrent viewpoint, *R.A.V. v. St. Paul, Minn.*, 505 U.S. 377 (1992).

Finally, any suggestion that nude performances might be proscribed as legally obscene must fail. The provisions of this law fall far short of the standards on which this Court insisted in *Miller v. California*, 413 U.S. 15 (1973) and later cases. The ordinance contains no requirement that a performance must exceed contemporary community standards in its "predominant appeal to prurient interest" or in its depiction or description "in a patently offensive way [of] sexual conduct specifically defined by the applicable state law," much less that it "lacks serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 25. To the contrary, this Court has consistently ruled that mere nudity in entertainment may not be equated with obscenity, *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), or banned to protect the privacy of those who might be offended by such public displays, *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-211 (1975).

The protected status of the type of expression in which respondents engage, and which is clearly forbidden by the challenged ordinance, is the starting point for First Amendment

analysis, but only that. The collateral effects of such a law are in some ways far more egregious.

II. WHERE THE TERMS OF A LAW PROHIBIT A WIDE RANGE OF PROTECTED EXPRESSION, A FACIAL CHALLENGE IS WARRANTED UNDER THE FIRST AMENDMENT.

This Court has consistently ruled that where the terms of a statute or ordinance reach a broad range of protected expression, the speech of others than those who are immediately affected should be considered in assessing the constitutionality of such a law. *Broadrick v. Oklahoma* limits that process to situations where the law specifically proscribes the content of a wide spectrum of protected speech, in ways that no limiting construction confines, and where such breadth inevitably creates a "chilling effect" upon other speakers. 413 U.S. 601, 611-612 (1973).

Under this analysis, the Erie ordinance merits just such scrutiny. While the nature of respondent's proscribed activity may be commercial entertainment, the potential reach of the language of the law is far broader. Here, for example, the definition of a "public place" would unquestionably include a "theater" within which various recognized and acclaimed artistic works might be performed, examples of which are set forth below. City of Erie Ordinance 75-1994. If such works included even momentary "appear[ance] in a state of nudity", the ordinance would by its terms

forbid the entire performance. *See id.* Even under the most narrow interpretation of the ordinance, if the presentees of such an event chose to restrict attendance to "adults or to patrons invited to attend," the event would fall beyond the one clause that might possibly limit the scope of the ordinance. *See id.* Indeed, the very breadth and scope of this ordinance leave to local law enforcement agencies and officers a dangerously wide range of discretion regarding expressive content, within a highly sensitive area of protected speech, *cf. Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

The prospect of such application is hardly fanciful, as the facts of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), make clear. There a municipal agency refused permission, chiefly because of brief nudity, to perform the Rock Musical *Hair* in a city auditorium -- an act which this Court deemed a clearly impermissible prior restraint of protected speech.

The challenged ordinance poses a wholly comparable threat to a broad range of acclaimed and fully protected artistic expression. Nudity as an expressive tool has a rich history in the American performing arts.[2] It is impossible to pinpoint the moment that nudity became an accepted component in serious artistic works, but there are certainly landmarks. *The Death of Adonis*, which

[2]The role of nudity in European and Asian works would involve a whole separate discussion, perhaps starting with performances of works like Aristophanes's *Frogs* in which it is believed the actors donned caricaturish attachments of oversized genitals, a practice that the Erie ordinance may define

featured pioneering choreographer and dancer Ted Shawn nude except for white body paint and a fig leaf — creating the image of a classic sculpture — was first performed in 1923 at a private reception at New England's Mariarden Art Center. TED SHAWN, ONE THOUSAND AND ONE NIGHT STANDS 146-148 (1979) The private reception was arranged because the organizers feared that general audiences may have found the work obscene. *Id.* The work, however, was a success and Shawn subsequently performed the dance around the country[3] and the world. It was perhaps the first time outside of vaudeville, that a "serious dance artist had ever accepted the challenge then inherent in the combination of nudity with movement." *Id.* at 146.

Dancers and choreographers continued to experiment with nudity into the 1960s, particularly the Judson dance theater movement in New York, of which amicus Yvonne Rainer was a founder. For choreographers such as Rainer, nudity served the purpose of de-eroticizing the body, emphasizing the ordinariness of the anatomy over the intimation of sexuality in the clothed dancer. And contemporary choreographers such as Bill T. Jones utilize nudity both to celebrate the beauty, grace and strength of varying human body types and to illustrate the body's ultimate frailty and

as "nudity."

[3]In February 1924 alone, Shawn and his company, Denishawn, performed in Kansas, Missouri, Oklahoma, Arkansas, Iowa, Illinois and Nebraska. A scheduled Providence, Rhode Island engagement was canceled by the local police commissioner because of the nudity in the troupe's work. TED SHAWN, ONE THOUSAND AND ONE NIGHT STANDS 151-153 (1979).

vulnerability. Camille LeFevre, *Nudity in the Promised Land Causes a Stir*, DANCE, Nov. 1990, at 13. Martha Clarke's *The Garden of Earthly Delights* (1987) used nudity to present a live action depiction of Hieronymous Bosch's painting of the same name. Clarke's *Vers la Flamme* (1999), which is featured this fall in Lincoln Center's "Great Performers" series, contains full frontal nudity. Other acclaimed choreographers and dancers such as Pilobolus, the Paul Taylor Dance Company, Momix, and Pina Bausch commonly utilize nudity in their works.

The advent of nudity in serious professional theater is traced to the 1967 production of Galt MacDermont and James Rado's musical *Hair* (1967) at New York's Public Theater. However, earlier examples may be found. Franco Zefferelli's staging of Shakespeare's *Romeo and Juliet* for the National Theatre of Britain was performed on Broadway in 1964. In it, the star-crossed lovers appear naked in bed. The 1966 Broadway production of Jay Presson Allen's *The Prime of Miss Jean Brodie* (1967) included a scene of a student modeling topless for her art teacher. *Hair* moved to Broadway's Biltmore Theatre where it played until 1972. During that time the New York stage featured a host of other plays containing nudity including Paul Foster's *Tom Paine* (1968) at Stage 73 in 1968, Michael McClure's *The Beard* (1965) in 1969, Tom Eyen's *The Dirtiest Show in Town* (1969) and Kenneth Tynan and Jacques Levy's *Oh! Calcutta!* (1969) both in 1970.

Although the nudity in *Hair* or *Oh! Calcutta!* may have been used for shock value or to symbolize liberation from societal conventions, nudity is an extremely versatile expressive tool capable of communicating the full spectrum of human conditions. And although there are many examples of nudity being used to convey an erotic message, — for example, David Rabe's *Hurlyburly* (1984) *and In The Boom Boom Room* (1972) or the recent Broadway production of David Hare's *The Blue Room* (1998) -- its use is in no way confined to expressing sex and sexuality. In *Angels in America: Millennium Approaches* (1991), for which amicus Tony Kushner won the 1993 Tony Award for Best Play and the Pulitzer Prize for drama, nudity is used in an anti-erotic way, to illustrate the ravages of disease and the characters' physical and emotional vulnerability. The play's second part, *Angels in America: Perestroika* (1993), which won the 1994 Tony Award for Best Play uses nudity to contrast the emotional conditions of other characters.

Margaret Edson's *Wit* (1998), the winner of the 1999 Pulitzer Prize for drama and numerous other awards, traces the decline and ultimate death of a terminally ill woman. The play concludes with the lead character, played off-Broadway by amicus Kathleen Chalfant, succumbing in her struggle with ovarian cancer by shedding her clothes in a blaze of pure, white, blinding light. This resolution of the play, the transcendent moment when physical deterioration and frailty are at last put aside and the spirit is released in freedom, can only be expressed through the use of on-

stage nudity and, according to amicus Chalfant, the playwright has refused performance rights to those who will not use it. *Wit* is one of the top ten plays scheduled for production around the United States in the 1999-2000 season. AMERICAN THEATRE, October 1999, at 68.

Even a nominal exposition of plays that call for nudity comprises an impressive roster of contemporary theater: Tony Award winning Best Plays such as amicus Terrence McNally's *Love! Valour! Compassion!* (1995), Harvey Fierstein's *Torch Song Trilogy* (1983) and Peter Shaffer's *Equus* (1975) ; musicals such as Stephen Sondheim and James Lapine's *Passion* (1994); A. R. Gurney's *Sweet Sue*, (1987) the Broadway production of which starred Mary Tyler Moore and Lynn Redgrave; Caryl Churchill's *Mad Forest* (1990) and *Cloud Nine* (1979); Elizabeth Egloff's *The Swan* (1989); John Guare's *Six Degrees of Separation* (1990); Doug Wright's *Quills* (1996); Craig Lucas's *Missing Persons* (1996); David Edgar's *Pentecost* (1996); Christopher Kyle's *The Monogamist* (1996); Jules Feiffer's *Carnal Knowledge* (1993); Lorraine Hansberry's *Les Blancs* (1970); and David Storey's *The Changing Room* (1973). These plays have been and continue to be performed, with the scripted nudity included, in non-profit and commercial theaters across the country.

Productions containing nudity are found in large cities and small towns, in local and regional companies as well as major ones. The New York stage currently features nudity in Tracy

Letts's *Killer Joe* (1998); David Hare's *Judas Kiss* (1998); David Dillon's *Party* (1992); and the Celebration Theatre's 1999 production of Robert Schrock's *Naked Boys Singing* (1999). Less urban theater audiences had the chance to see nudity in, for example, the Purple Rose Theater Company's (Ann Arbor, Michigan) production of B. Corbett's *The Big Slam* (1999); the premiere of Anita Gabrosek's *Disengaged* (1998) at Ohio University; Heiner Muller's *Hamletmachine* (1977) at Colorado University in 1996; and Charles L. Mee's *Big Love or The Wedding of the Millennium* (University of California-San Diego 1999). These are but a few examples.

Nudity also commonly appears in new interpretations of plays that were not necessarily written to include it. The 1991 production of Richard Alder's *Damn Yankees* (1955) featuring Jerry Lewis contained male nudity in one of its locker room scenes. This version of the play was performed at Broadway's Marquis Theater and traveled throughout the country. The current award-winning Broadway production of Fred Ebb's *Cabaret* (1966) includes live nudity. Two versions of Tennessee Williams's *A Streetcar Named Desire* (1947), a 1997 production by the American Conservatory Theater and a current production at the New York Theater Workshop, have also featured on-stage nudity. The recent Broadway production of Tennessee Williams's *Orpheus Descending* (1957), featuring Vanessa Redgrave, did as well.

Even Shakespeare's plays have been staged to include actors without costumes. Amicus Oregon Shakespeare Festival has produced two versions of *Measure for Measure* that contained nudity, one in 1986 and one in 1977. This past summer, the Ahmanson Theater in Los Angeles, presented a production of *Measure for Measure*, directed by Sir Peter Hall, that did as well. So too did the American Conservatory Theater's 1996 production of *Othello* in San Francisco and the Theatre for New Audiences 1999 production of *Macbeth* in New York.

Many operas also call for nudity in their librettos, Richard Strauss's *Salomé* (1905), and Sergey Prokofiev's *The Fiery Angel* (1954). Also requiring nudity are Camille Erlanger's *Aphrodite* (1905), Carlisle Floyd's *Susannah* (1957), and Hugo Weisgall's *Esther* (1993). Many productions of Giuseppe Verdi's *Rigoletto* (1850) and Richard Wagner's *Die Walküre* (1856) will contain nudity. Other examples include the San Francisco Opera's 1989 production of Arrigo Boito's *Mefistofele* (1868) and 1994 production of Jules Massenet's *Hérodiade* (1881), which starred renowned tenor Placido Domingo, and the Long Beach Opera's 1998 production of Henry Purcell's *The Indian Queen* (1695).

Because the Erie ordinance offers no guidance as to which productions will be considered a threat to the city's public health, safety, and welfare, presenters and performers are left to guess whether they will run afoul of the ordinance if they stage any of the above-mentioned works. By its terms, the ordinance leaves

artists to guess whether their use of nudity will be deemed acceptable by local officials. Those who are fearful of prosecution — likely a significant number especially when the considerable investments most of those works require are at risk — will be inclined to simply forfeit their constitutional right to present this protected artistic expression. That chilling effect is something the First Amendment plainly does not allow.

A telling example of this chilling effect occurred in 1998. The Actor's Theater of Charlotte (North Carolina) had planned a production of Heather McDonald's *Dream of A Common Language*, a play which ironically addresses the very issue of artistic freedom. *Theater Cancels Play with Nudity*, Wilmington Star-News, November 18,1998, at 3B. The play depicts a female artist in the 1890s, a time when women were not permitted to use live nude models. At the conclusion of the play, her husband agrees to model for her and removes his clothes on stage, a plot device that crystallizes the play's message. However, North Carolina's public nudity law makes no exception for artistic performance. *Id.* Despite assurances from local officials that the theater would not be prosecuted under the law, the theater canceled the performance rather than jeopardize its main funding source, the Charlotte-Mecklenburg Arts & Sciences Council. *Id.* The Arts & Sciences Council does not fund organizations that violate local, state or federal laws.

Such examples as these, drawn from a broad spectrum of the performing arts — to all of which the terms of the Erie ordinance unmistakably apply — confirm the need for strict scrutiny. Such a standard is consistent with the rigorous review this Court has applied to comparable laws that restrict or forbid protected expression well beyond the circumstances of the immediate case.

III. TO THE EXTENT RESPONDENT'S EXPRESSION MAY INVOLVE CONDUCT AS WELL AS SPEECH, THE RULING OF THE COURT BELOW WAS CLEARLY SOUND.

Whatever degree of First Amendment protection any nude performance may enjoy, laws that regulate such activity must at the very least meet the criteria announced in *United States v. O'Brien*, 391 U.S. 367 (1968). Thus, even if a law "furthers an important or substantial governmental interest," the goals it serves must be "unrelated to the suppression of free expression," and any "incidental restriction on alleged First Amendment freedoms [must be] . . . no greater than is essential to the furtherance of that interest." *Id.* at 377. As the court below found, the challenged ordinance fails both those parts of the *O'Brien* test, even if furtherance of a substantial governmental interest be established. *See Pap's A.M. v. City of Erie*, et.al., 719 A.2d 273, 278 (1998).

First, a challenged law must be shown to further governmental interests that are "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. The *Barnes* plurality concluded, as had the lower courts, that such an interest was served. 501 U.S. at 569. In the present case, however, the state's highest court has ruled that the ordinance fails because at least one of its goals does relate to suppression of expression. *City of Erie*, 719 A.2d at 279. Specifically, along with the stated purpose of "combat[ting] negative secondary effects [there is] inextricably bound . . . an unmentioned purpose that directly impacts on the freedom of expression: that purpose is to impact negatively on the erotic message of the dance." *Id.* The Pennsylvania Supreme Court added that, by analogy to this Court's ruling in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992), "[s]imilarily, the negative secondary effects associated with nude dancing are inextricably linked to the erotic message of the dance." *City of Erie*, 719 A.2d at 279. Such a clear ruling by a state's highest court sustains, indeed compels, a negative answer to *O'Brien*'s third desideratum -- whether the interests served by the challenged law are "unrelated to the suppression of expression." *O'Brien*, 391 U.S. at 377.

Equally clear is a negative response to *O'Brien*'s fourth question -- whether any "incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of [a valid] interest." *Id.* The fatal flaw in the Erie

ordinance, ruled the Pennsylvania Supreme Court, is the "highly circuitous" path it follows toward an arguably valid municipal interest in deterring "rape, prostitution and other sex crimes" by barring unclad performances by dancers. *City of Erie*, 719 A.2d at 280. The alternative suggested by the court below -- "imposing criminal and civil sanctions on those who commit sex crimes" would beyond doubt provide "a far narrower way of achieving the compelling governmental interest." *Id.* If such an alternative would fully meet a city's needs in regard to the expression involved in the present case, it would even more clearly meet any valid governmental interests that might exist with respect to the acclaimed artistic works that amici have described in the preceding section.

Where, even in theory, less restrictive means exist by which regulatory goals may be met, the First Amendment compels resort to such alternatives, *Boos v. Barry*, 485 U.S. 312, 329 (1988). Where the highest court of a state has found that such an option not only exists in fact, but would in addition be substantially less restrictive of protected expression, the imperative that government prefer such an alternative seems compelling.

The failure of this ordinance to meet either the third or fourth elements of the *O'Brien* test should be dispositive. Where the state's highest court has found that a state or local law neither serves interests unrelated to the suppression of free expression, nor restricts speech to no greater extent than is necessary to serve its stated goals, the invalidity of such a law is beyond dispute.

CONCLUSION

For the foregoing reasons, amici respectfully urge affirmance of the judgment of the court below.

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September 29, 1999

Supreme Court, U.S.
FILED
SEP 30 1999
CLERK

(17)

No. 98-1161

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

City of Erie,

Petitioner,

v.

Pap's A.M.,

Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE AMERICAN ASSOCIATION FOR NUDE RECREATION *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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On Writ of Certiorari to the Supreme Court of Pennsylvania

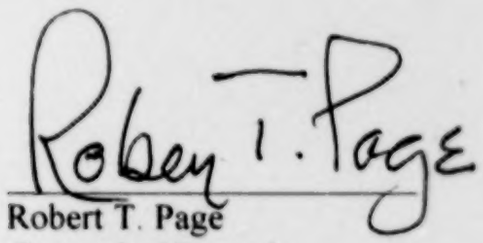
MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

The American Association for Nude Recreation, a Florida not for profit corporation, respectfully moves this Honorable Court for leave, pursuant to Rule 37, to file the attached brief *amicus curiae* in support of the Respondent. Permission of the parties has been sought and counsel of record for the Petitioner, City of Erie, has respectfully declined such permission. Counsel for Respondent consented.

The interest of your *amicus* is more fully developed in that portion of our tendered brief devoted to that subject. The Association has more than fifty thousand members who are family social nudists, and a more than two hundred thirty

nudist affiliated clubs in North America, of which nine are in Pennsylvania. It is our concern that ordinances such the one at issue in this case could, because of broad, generally applicable prohibitions on public nudity, substantially interfere with the inoffensive practice of social nudism in appropriate venues. Thus, your *amicus* believes it has information and views on the issues in this case which this Court may find useful to hear.

Respectfully submitted,



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Dated September 30, 1999.

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BRIEF OF THE AMERICAN ASSOCIATION FOR NUDE RECREATION IN SUPPORT OF THI RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The American Association for Nude Recreation ("AANR"), formerly known as the American Sunbathing Association, is a Florida not for profit corporation. With roots dating to 1931, the AANR has grown to an organization of more than 50,000 members in North America, consisting of people from all walks of life, in all ages, shapes and sizes. We have over two hundred and thirty clubs in the United States and Canada, and we are affiliated world wide with the International Naturist Federation, located in Antwerp, Belgium. AANR has budgeted annual revenues of in excess of one and one-half million dollars. Our professional staff at our headquarters numbers sixteen.[2] AANR and its affiliated clubs are family-oriented organizations with high standards, including the following principles reprinted on every membership card:

> We believe in the essential wholesomeness of all human bodies. We believe in the naturalness of social nudism. We consider that the exposure of the entire body to light and air

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel state that they have authored this brief in its entirety and that financing thereof has been from funds available to the organization.

[2] For more information see www.aanr.com.(1999)

> is beneficial to physical and mental health. We believe that recreation - from exercise to relaxation and socialization - is enhanced by the nudist experience. We believe that we have the right to practice social nudism in appropriate settings, provided that we do not infringe on the rights of others.

Social nudism as practiced within our clubs provides a wide range of activities for people of all ages. Athletics, social recreation, and interpersonal communications promote the betterment of body and mind and strengthen family bonds.

Modern [3] social nudism generally traces its beginnings

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[3] As far back as ancient Greece, the unclothed human body has been accepted at certain times and places as both fitting and proper. In his "Life of Lycurgus," Plutarch wrote of the Spartan ruler:

> [He] ordered the maidens to exercise themselves with wrestling, running, throwing the quoit, casting the dart .... And to the end that he might take away their over-great tenderness and fear of exposure to the air, and all acquired womanishness, he ordered that the young women should go naked in the procession, as well as the young men, and dance, too, in that condition, at certain solemn feasts, singing certain songs, whilst the young men stood around seeing and hearing them. Nor was there anything shameful in this nakedness of the young women; modesty attended them and all wantonness was excluded. It taught them simplicity and care for good health, and gave them some taste for higher feelings, admitted as they were, thus, to the field of noble action and glory.

PLUTARCH, LIVES OF THE NOBLE GRECIANS AND ROMANS 59-60 (Mod. Lib. Ed. 1967).

to turn-of-the-century Germany, where *freikorperkultur* ("free body culture") parks were established with emphasis on outdoor physical conditioning, vegitarianism, and clean living. Caffeine, tobacco, and alcohol were taboo. This history, with its air of self-justification, is responsible for some jokes and misperceptions of nudists as a cult carrying on activities in semi-secret "colonies." Fortunately, this image is changing as people recognize nudism as a legitimate choice of living style or preferred adjunct to recreation.[4]

In 1980 The Naturist Society was founded in Oshkosh, Wisconsin to focus on the interest in the phenomenon of so-called free beaches and similar recreational use of public lands in secluded areas, hot springs and traditional locations long used for skinny dipping. Some of those areas, like Black's Beach in San Diego, California, have become as famous as they are popular, not unlike the growth which has occurred in the Mediterranean nudist resort playgrounds of Spain, France and the former Yugoslavia. In other locales, such as Rooster Rock State Park, Oregon, local governments have established official nude beach areas with appropriate park facilities and signs to advise the public. [5]

A Gallup poll confirms that those beliefs are in accord with mainstream America. The poll showed a seventy-two percent majority acceptance of the idea that there should be

---

[4] A thorough exposition of the history and philosophy of the nudist movement in Europe and North America is found in *Roberts v. Clement*, 252 F. Supp. 836 (E.D. Tenn. 1966).

[5] *See, e.g.*, Kellum and Lovelace, *To Bare or Not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing*, 20 U. Rich. L. Rev. 589 (1986).

areas for nude recreation.[6]

Social Nudism in Pennsylvania.

Nine clubs affiliated with the Association are located in Pennsylvania. Three of them are what we refer to as non-landed clubs. In other words, they do not own or control private property as in the case of most other nudist clubs. Instead, the members gather for secluded back yard functions, trips to other nudist clubs, clothing optional beaches and the like. Such clubs also rent other facilities such as health clubs and spas for the enjoyment of nude recreation, especially in the winter. In 1988, a New York nudist travel club just north of Erie rented the premises of a business in Erie, Pennsylvania known as Presque Isle Spas for hot tub parties. The Erie ordinance could clearly be used to prohibit such activity. Absent a holding that Erie's type of ordinance is unconstitutionally over broad in so far as it could reach nudists and their activities, other local governments throughout Pennsylvania could legislatively ban these legitimate recreational and social interests.

White Thorn Lodge is another of our clubs, located in

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[6] Gallup Organization, Inc., Most Americans Approve of Nude Recreation (Princeton, N.J., June, 1983). A recent *USA Today* feature noted that "A tally by the *Bay Area Guardian*, a San Francisco alternative news paper, found 185 stretches of beach along California's 840-mile coastline that are frequented by nude sunbathers, far more than any other state. The Naturist Society, which publishes a world guide to nude beaches and resorts, says that nudity happens on about 650 beaches nationwide." *USA Today Nation*, 8/27/99 (electronic edition). In a sidebar poll, the question "Would you ever go to a nude beach?" was answered "Yes, I'd go in the buff" 34.9 percent; "Yes, I'd go if clothing were optional" 32.6 percent; and "No, I'd never go to a nude beach." There were 2870 total responses.

Darlington, Pennsylvania. Each year it sponsors a tournament billed as the Superbowl of Volleyball. Top level volleyball players from around the country gather for top flight competition over the course of three days. Some play clothed, others not. Hundreds of spectators pay to see this particularly spirited form of nude entertainment.

Our Experiences with Erie-style Ordinances.

Last year, South Carolina State Representative Brad Jordan was chided in the press for introducing an anti-nudity measure so broad it would punish breast feeding mothers, diaper changers, and students in an after gym class shower with fines of as much as $1,000. The legislator was quoted as saying that he needed to pattern his bill with exactitude to conform to the teachings of *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) and the Indiana law there upheld. *See* "House to Consider Nudity Bill This Week: Legislation Could Make Outlaws of Nursing Mothers" *The State* April 28, 1999 at 1. Indeed, many jurisdictions have not been as sensible as Erie, refusing to exempt nursing mothers or young children because the Indiana statute contained none. In *J&B Entertainment v. City of Jackson*, 150 F. 3d 362 (5th. Cir. 1998) the court explicitly recognized that the ordinance it there upheld would criminalize breast feeders, romping toddlers and adult businesses alike.

An examination of our experience in Florida reveals the troublesome consequences for the future of nude recreation that have come in the wake of *Barnes*. Within the past year, the Association has had to lobby against passage of at least eight new local nudity ordinances. In challenging these measures, AANR has consistently found that officials do not wish to threaten the existence of nudist activities if they can avoid, but they fear the appearance of not being even

handed.

Thus, the interest of your *amicus* arises from the very real and substantial possibility that, without clarification and limitation, laws such as the one at issue here could be used to impair our legitimate and protected activities.

SUMMARY OF ARGUMENT

I. Not all forms of nudity may be banned. In many forums, public nudity is recognized as protected expression. Ordinances such as Erie's offend the Constitution because they reach public nudity which occurs under circumstances that do not generate the kind of adverse secondary effects pivotal to the justification of restrictions on nudity upheld in *Barnes v. Glen Theatre*, whether it be legitimate theatre or nudist activities. And governments are not free to pick and choose what nudity it will recognize as protected.

II. The legitimate and protected activities of social nudists are invaded by the unlimited reach of the Erie ordinance. It contains no requirement, such as is found in Pennsylvania state law and the Model Penal Code. Nudists have liberty and privacy interests which may be constrained by the ordinances potential reach.

ARGUMENT

I. ERIE'S ORDINANCE IS SUBSTANTIALLY OVER BROAD IN THAT IT REACHES NUDE ACTIVITY WHICH PRODUCES NO ADVERSE SECONDARY EFFECTS.

Public Nudity.

It is commonly asserted that *all* public *nudity* was a crime at common law. *See, Brief of National Family Law Foundation* at 8, note 21. Such was decidedly not the case. As Professor Perkins notes:

> *Indecent exposure* of the person to public view is . . . a common law misdemeanor. Blackstone did not deal with it separately. "The last offense which I shall mention , . . . more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*; either by frequenting houses of ill fame. or by some grossly scandalous and public indecency, . . .". (Citing 4 Bl. Comm. * 64-65) (emphasis in the original sources).

ROSCOE PERKINS, PERKINS ON CRIMINAL LAW 336-37 (Foundation Press, 1957). Development of English common law, for the most part, predates the development of private bathrooms and bathing appliances. Judge Posner points out that "in fact medieval people were quite casual about appearing nude in public, for example en route to the public bath." RICHARD POSNER, SEX AND REASON 357 note 12 (Harvard 1992).[7]

Lack of Secondary Effects.

This Court has recognized that not all forms of nudity may be banned, *New York v. Ferber*, 458 U.S. 747, 765, n. 18, citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975), and that "nudity, without more is protected expression." *Id. See also, Jenkins v. Georgia*, 418 U.S. 152 (1974); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *Massachusetts v. Oakes*, 491 U.S. 576 (1989).

Nudist and naturist organizations face substantially similar threats from ordinances like Erie's as those articulated by theatrical arts groups. *See, Joint Appendix* 86-90; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Nudist clubs and nudist activities, as with legitimate theatres, implicate none of the so-called "adverse secondary effects" so key to this Court's decision in *Barnes v. Glen Theater*, 501 U.S. 560 (1991). At least five members of the *Barnes* Court seemed to recognize that urban blight and dissolute behavior are not generated by nude performances at venues such as New York's Lincoln Center. *Id.* at 585 note 2 (Souter, J. concurring) and at 594 (White, J. dissenting).

The legislative history of Erie's ordinance shows that

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[7] *Le Roi v. Sidley*, 1 Sid. 168, 82 E. R. 1036 (1663) is often cited in support of the assertion that mere nudity was a crime at common law. In fact, the case supports the proposition, later formulated into the Model Penal Code as discussed *infra* at , that an offense required an element of intended affront or breach of good order. Mr. Sidley, in an apparent state of intoxication, appeared naked on a balcony overlooking London's busy Covent Garden; his effrontery must be presumed.

adverse secondary effects played no part in the generation of the law at hand, as opposed to a previously contemplated zoning ordinance. Rather, it is based on the moral revulsion of a majority of the voting body. *See* Joint Appendix 36-48. In *Triplette Grille, Inc. v. City of Akron*, 40 F. 3d 129,135-36 (6th Cir. 1994) the court held that "because the City failed to demonstrate a link between *nudity in non-adult entertainment* we do agree with the district court that the Akron ordinance must be struck down as facially unconstitutional under the First Amendment doctrine." (emphasis added). Substantially the same defects are present in the Erie ordinance.

This Court's decision in *Barnes v. Glen Theatre, supra* has led directly to a flurry of new local ordinances and state statutory proposals similar, in effect, to the Erie law. Many of them explicitly recite that the authority they claim is supplied by *Barnes*. *See, e.g., Brief of the American Liberties Institute et al., Amicus Curiae* at 1; ORANGE COUNTY PUBLIC NUDITY ORDINANCE, Sec. 26-26 appended to its *Brief, Amicus Curiae* at A-1,2. *Barnes* has thus invited regulators to depart from the traditional formulation recommended by the Model Penal Code discussed *infra* at 15. This has led to confusion, as well as extended litigation (*See, Brief of Orange County, supra* at 1) because of the overbreadth caused by implicating interests which governments previously had no business regulating. *E.g., Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317 (M.D. Fla. 1998) (invalidating permit scheme which limited public events at city facilities to those promoting "family values.").

In fact, nudist clubs and recreation facilities generate positive economic effects.

> Some municipalities have discovered that tolerance of nudism can be highly profitable. There was considerable resistance on the part

> of merchants and the Mayor's Office in Miami to allowing nude bathing on its now famous Haulover Beach. Once it was opened for such use, a veritable flood of European tourists prove to be an economic boom. Florida-based cruise ship lines, formerly unreceptive to nudist organizations, now solicit their business, and it is possible to sign on for a Caribbean cruise with hundreds of other nudists.

Layng, "Confronting the Public Nudity Taboo," *USA Today Magazine/ March 1998* 24, 27. *See also*, Pilla, "Battle Over Beach Nudity May Hurt State Tourism," *Wall Street Journal*, July 19, 1995 (reprint) noting that Ft. Lauderdale, Florida considers the availability of nude recreation to be one of the top five factors in attracting international convention business.

Overbreadth.

To allow a governing authority to follow a "good taste"guide to when or whether it will enforce a nudity ban raises the chilling effects on speech that this Court and the First Amendment does not permit, and it dramatically illustrates its overbreadth. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). As the theatre interests in the instant case informed the trial court:

> We appreciate the City's position that it does not intend to enforce the ordinance against the arts community. However; the current administration's promises are not binding on future administrations. As long as the ordinance is on the books and can be enforced it will have a negative impact on the arts in Erie.

Joint Appendix 86-87.[8]

The very existence of such circumstances under ordinances such as this, as spawned by *Barnes*, shows its facial overbreadth.[9] When potentially applicable to the activities of

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[8] The trial judge also noted the dilemma.

> THE COURT: . . . [W]hat effect would this ordinance have on theater . . . productions such as Equus, Hair, O Calcutta? Under your ordinance would these things be prevented, Mr. Karle?
>
> MR. KARLE: No, they wouldn't, Your Honor.
>
> THE COURT: Why not?
>
> MR. KARLE: To the extent that the expressive activity that is contained in those productions rises to a higher level of protected expression, they would not be.
>
> THE COURT: Where does it say that in the ordinance, sir?

Id. 53.

[9] The design of these post-*Barnes*, broad-form ordinances prohibiting all nudity appears to be quite deliberate. One of the leading

social nudists, the overbreadth is real and substantial. *Roberts v. Clement, supra* 843-44. *See also, National Endowment for the Arts v. Finley*, 524 U.S. 569, at -(1998) (Souter, J. dissenting) (". . .to whatever extent NEA eligibility defines a national mainstream, the proviso will tend to create a timid aesthetic. And either way, the proviso's viewpoint discrimination will chill the expressive activity of persons not before the court." (internal quotation marks and footnote deleted).

What nudists believe is a life-affirming message of freedom and body acceptance cannot be effectively conveyed in the abstract. And a social nudist movement finds its rightful place, if not a majority one, in a society that cherishes the free competition of ideas. Prohibitions of the type found in the Erie ordinance and the Indiana statute at issue in *Barnes* cannot, in reality, be seen as content neutral and reaching only conduct, because for the message to get out, the activity must be able to exist. *Texas v. Johnson*, 491 U.S. 397 (1989); *Police Department of Chicago v. Mosley*, 408 U.S. 92

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proponents nationwide of such ordinances is the National Family Legal Foundation. *See, Brief of the National Family Law Foundation, supra* at 1. In their legal materials used to advise local government officials, they state:

> Even when challenges are grounded in the First Amendment, most indecent exposure laws have been upheld. However, this is true only when the statutes or ordinances are truly content-neutral. It is crucial, therefore, that all ordinances be directed at prohibiting *all public nude conduct*, not just nude "dancing" or other nude conduct with some *expressive element*.

LEN MUNSIL and JAMES MUELLER, HOW TO LEGALLY STOP NUDE DANCING IN YOUR COMMUNITY B-11(NFLF 1995) (emphasis added).

(1972); *Griswold v Connecticut*, 381 U.S. 479 (1965). *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).[10]

II. ORDINANCES SUCH AS ERIE'S SUBSTANTIALLY INVADE PROTECTED LIBERTY AND PRIVACY INTERESTS OF SOCIAL NUDISTS.

Social Nudism is a Legitimate, Lawful, and Protected Activity.

Current Pennsylvania state law criminalizes public nudity only in so far as it involves the exposure of genitals or the commission of sex acts in front of a third person with the intent to arouse or gratify sexual desire and with the knowledge that the viewer may be offended thereby. PA. CONST. STAT. ANN. secs. 3127, 5503, 5901. This is a common formulation in use in most states and is a outgrowth of the statutory and common law codifications contained in the MODEL PENAL CODE. As Judge Posner and his co-author

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[10] Posner observes:

> So nudist colonies (sic) on private property are all right, but nudists should not be permitted to parade in the public streets. . . . Indeed, the only harm is the indignation hat some members of the majority will feel at the thought that somewhere, perhaps thousands of miles away, a group of people are acting on preferences that the majority finds disgusting. POSNER, *supra* 233.

And he goes on to illustrate this majoritarian view in contemporary thought by quoting from ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 123 (1989) "No activity that society thinks is immoral is victimless. Knowledge that an activity is taking place is a harm to those who find it profoundly immoral." *Id.* note 23.

explain:

> The Model Penal Code clarifies the traditional public indecency statutes in (that) it requires that the exposure be for the purpose of arousing or gratifying the offender's sexual desire or the or the sexual desire of someone else. This provision seeks to separate nude sunbathing and prank activity such as streaking from acts of sexual aggression, prohibiting only the latter. Many states have adopted this aspect of the Model Penal Code, leaving the question of nude sunbathing to local ordinances that prohibit disorderly conduct. RICHARD POSNER and KATHERYN SILBAUGH, GUIDE to AMERICA'S SEX LAWS 83 (U. Chicago 1996).

But it is also recognized that nude sunbathing, in appropriate conditions, is not disorderly conduct either. *United States v. A Naked Person*, 841 F. Supp. 1153 (M.D. Fla. 1993); *In re Smith*, 7 Cal. 3d 362, 497 P.2d 807 (1972); *People v. Gilbert*, 72 Misc. 2d 795, 339 N.Y.S. 2d 743 (Cr. Ct. 1973).

Erie's nudity ban may be aimed at striptease clubs. But in effectively curtailing the legitimate and fully legal activities of social nudists in Erie, now or in the future, it sweeps far too wide. The activities of social nudists are not anything resembling the erotic performances of strip tease dancers. Fundamental liberty interests are at stake here. Two federal court cases are particularly instructive.

In *Roberts v. Clement*, 252 F. Supp. 835 (E. D. Tenn. 1966) a three judge court, after extensively tracing the development of social nudism in Europe and North America,

held unconstitutional under the Fourteenth Amendment's due process guarantees a statutory effort by the State of Tennessee to ban nudist practices.

> Defendants (Tennessee) say that the statute was passed under the police power . . . and that the words in it should be given their natural and ordinary meaning. But it cannot be said with certainty whether persons of one sex taking sun baths in the nude in isolated places is prohibited. The question of whether a man and his wife can take a sun bath in the nude in an enclosure hidden from the public without violating the Act is in doubt. Restriction on nudist practices and the operation of nudist colonies as to time and place is unlimited.
>
> A statute that contains a criminal sanction that is so unclear and indefinite as to make it uncertain in meaning does not meet the due process test contained in the Fourteenth Amendment to the Federal Constitution. *Id.* at 843.

In *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970) the court held that an applicant for a position with the Baltimore Police Department rights of freedom of association were violated by the rejection of his application based solely on the fact that he was a nudist, there being no nexus between his activities and a paramount government interest. After an extensive and reasoned elaboration of the state's admittedly great power and latitude in areas of public employment, especially those involving public safety, the court went on to find that:

> This court has uniformly held that nudism *per se* is not immoral or obscene (Citing nudist

> magazine cases).... Nudism may be unappealing and unattractive to some people. It may be repulsive and vulgar to others. But that does not limit its right to constitutional protection. Whether or not it appeals to or repels an individual's sensibilities is irrelevant when a court is bound to apply First Amendment rights which do not incorporate such subjective standards.
>
> Plaintiff's activities at Pine Tree Associates (a nudist club) in no way intrudes upon the public's sensibilities. He is a member of a group whose activities are neither illegal nor immoral and which are carried on unobtrusively. The group has a good reputation in this community. The record reveals the plaintiff's behavior to be above reproach in his employment and in his neighborhood.
>
> To condition one's employment upon the relinquishment of his constitutional right is an unwarranted and illegal intrusion upon that fundamental right that will serve as a "chilling effect" upon the exercise of other rights as well as a deterrent upon others in exercising this same right. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed.2d 22 (1965). The reprisal here of forbidding employment to the plaintiff because he is a nudist will have the effect of stifling others from undertaking the valid exercise of this right. An individual will be hesitant in practicing nudism once he is aware that the avenue of employment as a member of the Baltimore City Police Department is closed. As

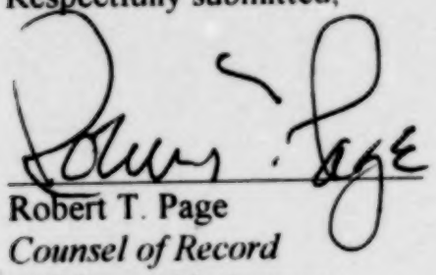
> defendant Pomerleau testified, no nudist would be hired on the police force. Such an arbitrary exclusion is inconsistent with Constitutional guarantees. *Id.* at 67.

While rejecting the nudist plaintiffs' challenge to an anti-nudity regulation at the Cape Cod National Seashore, the court in *Williams v. Hathaway*, 400 F. Supp. 122 (D Mass. 1975 *aff'd sub nom. Williams v. Kleppe*, 539 F. 2d 803 (1st. Cir. 1976) did recognize that they enjoyed a protected associational interest in the practice of social or recreational nudism. *See also, Sierra Club v. Morton*, 405 U.S. 727 (1972); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). This Court has consistently recognized that so long as no breach of the peace or subversive, discriminatory or otherwise illegal activity is carried out, the assembly clause protects the rights of associations to free and private exercise of their rights under the First Amendment as well as less specified penumbrae of the Constitution. *NAACP v. Alabama, 357 U.S. 449 (1958); Gibson v. Florida Legislative Com[illegible]*, 372 U.S. 539 (1963). *See also, Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Nudists enjoy such protected rights as well. *Bruns v. Pomerleau, supra*.

CONCLUSION

Your *amicus* submits that affirming the judgment of the Supreme Court of Pennsylvania this Court would cure the overbreadth problems which have arisen from the reading of *Barnes v. Glen Theatre, supra* and thereby protect the liberty interests thousands of citizens have in a form of public nudity far removed from barroom-style adult entertainment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Robert T. Page, counsel of record for *Amicus Curiae* American Association for Nude Recreation, pursuant to the Rules of this Court, do hereby certify that I have caused to be served on the following persons at the addresses listed, three copies of the forgoing brief, by common carrier delivery on the 30th day of September, 1999.

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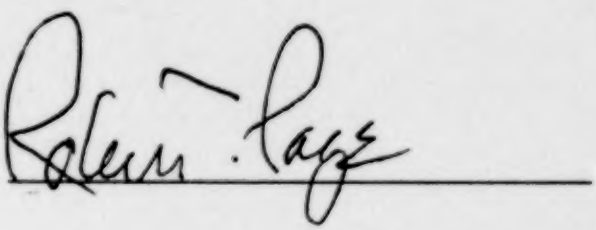

(18)

Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

No. 98-1161

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

The City of Erie, Pennsylvania, Joyce A. Savocchio, Chris E. Maras, Mario S. Bagnoni, Robert C. Brabender, Denise Robison, and James N. Thompson, all in their official capacities,

Petitioners,

vs.

Pap's A.M., t/d/b/a "Kandyland,"

Respondent.

On Writ of Certiorari
To the Supreme Court of Pennsylvania

BRIEF AND APPENDIX OF THE FIRST AMENDMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF AFFIRIMANCE

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Argument 2

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STATEMENT OF AMICUS

Amicus Curiae First Amendment Lawyers Association [1] is an Illinois not-for-profit corporation with some 172 members throughout the United States. Its membership consists of attorneys whose legal practices consist in large measure of the defense of First Amendment rights against governmental intrusion. The interest of amicus is that amicus takes the position that the fragmented decision of this Court in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), has created substantial confusion in lower courts throughout the United States as to the permissible extent of government regulation of constitutionally protected speech. Amicus curiae urges this Court to adopt the position that, to the extent that concerns of "order and morality" are a permissible basis for regulation of otherwise constitutionally protected speech, that regulation should be limited to prohibiting the legally obscene pursuant to *Miller v. California*, 413 U.S. 15 (1973) or regulating speech forced upon a captive audience. Moreover, amicus takes the position that to the extent that the doctrine of "secondary effects" can be used to restrict constitutionally protected speech, such doctrine cannot theoretically nor factually support the regulation at issue in the instant case.

1 Counsel for neither party authored the present amicus brief in whole or in part. Richard W. Jacobson of Cannon Falls, Minnesota, has made a financial contribution toward the preparation of the present brief. This disclosure is being made pursuant (6) of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. See Appendix at A.75 - A.77.

SUMMARY OF ARGUMENT

Because the ordinance in the instant case is directed at expression, it is not governed by the plurality opinion in *Barnes v. Glen Theatre, Inc.*, supra, 501 U.S. 560 (1991). To the contrary, any interest in morality cannot justify the suppression of speech unless said speech is obscene under *Miller v. California*, supra, 413 U.S. 15 (1973), or imposed upon a captive audience. To the extent that the Justice Souter's concurring opinion in *Barnes* relies upon a "secondary effects" doctrine to ban nude dancing, such reliance is unjustified, both theoretically under the "secondary effects" decisions of this Court, and factually. As a result, the Supreme Court of Pennsylvania correctly concluded that the restriction at issue in the instant case was an impermissible content-based restriction upon speech and such decision should be affirmed.

ARGUMENT

I. AS A RESTRICTION PLAINLY DIRECTED AT EXPRESSION, THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER THE "ORDER AND MORALITY" THESIS OF THE

PLURALITY OPINION AND SCALIA CONCURRENCE IN *BARNES*.

To be sure, in both the plurality opinion of Chief Justice Rehnquist and the concurring opinion of Justice Scalia in *Barnes*, an Indiana Public Nudity Statute nominally similar to the ordinance at issue in the instant case was upheld, premised upon the governmental interest in order and morality.[2] However, both the plurality opinion of Chief Justice Rehnquist and the Scalia concurrence specifically conditioned upholding the Indiana statute in *Barnes* upon the fact that the regulation in question was a prohibition of public nudity in general, and not a prohibition specifically aimed at expressive conduct such as nude dancing. In his plurality opinion, Chief Justice Rehnquist specifically wrote:

> "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board. Id. at 566.

Concerning the legislative history of the Indiana Statute, Justice Rehnquist wrote:

2See plurality opinion:, "[T]he public indecency statute furthers a substantial government interest in protecting order and morality. " 501 U.S. at 569. See also concurring opinion of Justice Scalia, justifying the ordinance because public nudity is 'contra bons mores,' i.e., immoral." Id. at 575, Scalia, J., concurring.

> "This public indecency statute follows a long line of earlier Indiana statutes banning all public nudity. The history of Indiana's public indecency statute shows that it predates barroom nude dancing and was enacted as a general prohibition." Id. at 568.

From the history and language of the statute, Justice Rehnquist concluded:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes and ages in the nude at a beach, for example, would convey little if any erotic message, yet the state still seeks to prevent it. Public nudity is the evil the state seeks to prevent, whether or not it is combined with expressive activity." Id. at 571.

Likewise, in his concurring opinion, Justice Scalia examined the same statutory language and legislative history and concluded that the statute was not aimed at expressive conduct, but intimated that even if it were selectively applied only to expressive conduct, the First Amendment would be violated. Justice Scalia stated:

> "Indiana's first public nudity statute, [Citation omitted.], predated by many years the appearance of nude barroom dancing. It was general in scope, directed at all public nudity, and not just at public nude expression; and all of the succeeding statutes, down to the present one

have been the same. Were it the case that Indiana in practice (emphasis by Justice Scalia) targeted only expressive nudity, while turning a blind eye to nude beaches and unclothed purveyors of hot dogs and machine tools [Citation omitted.], it might be said that what posed as a regulation of conduct in general was in reality a regulation of only expressive conduct. Respondents have adduced no evidence of that. Indiana officials have brought many public indecency prosecutions for activities having no communicative element. [Citations omitted.]" Id. 573-574, Scalia, J., concurring.

By contrast, the record in the instant case is indisputable that, far from being a general prohibition of nudity which long predated nude dance entertainment, the express justification of the ordinance in the instant case, on its face, is suppression of nude dance expression. The ordinance specifically repealed a long-standing prohibition on public indecency and immorality, and set forth the following justification for the ordinance:

> "Council specifically wishes to adopt the concept of Public Indecency prohibited by the laws of the State of Indiana, which was approved by the U.S. Supreme Court in *Barnes v. Glen Theatre, Inc., et al,* 111 Sup. Ct. (sic) 2456 (1991) for the purpose of limiting a recent increase in nude live entertainment within the city (emphasis supplied), which activity adversely impacts and threatens to impact the

> public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." Appendix to Petition for Writ of Certiorari, at 7a.

Moreover, the legislative history as reflected in transcription of the videotape of the Erie City Council, plainly supports the proposition that content-based censorship of expression was the genesis of this particular ordinance. For example, Council Member Thomson, in describing nude dance entertainment, states, "It is live pornography. It is not acceptable in this city, has never been and never will be." Joint Appendix at 40. Council Member Brabender, in support of the ordinance asserted that 18-year old persons were "not allowed to drink at 18 years of age, but they can frequent some of these clubs along with them. I don't know if that's a real wholesome atmosphere." Id. at 42. Council Member Brzezinski plainly asserted that the issue was not about public nudity, but of closing down nude dance establishments, asserting:

> "But we're not talking about nudity, we're not talking about people's choices, we're talking about three clubs, two of which - or three, all three, will be shut down in one form or another until they figure out another way to get around it and do it again." Id. at 45.

Because the record plainly indicates that the ordinance in the instant case was not adopted as a general prohibition against nudity, but rather, on its face, plainly targeted protected expression, it is clear that neither the "order and morality" analyses of the plurality opinion nor the Scalia concurrence is applicable. Quite to the contrary, this Court has repeatedly held that moral objections cannot be the basis for restricting otherwise constitutionally protected expression. As this Court noted in *Texas v. Johnson*, 491 U.S. 397, 414 (1989) "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[3]

The only exceptions this Court has made in this regard are for legal obscenity, under *Miller v. California*, supra, 413 U.S. 15 (1973), and for captive audiences. Neither exception is applicable here.

The ordinance plainly goes far beyond the prohibition of *Miller* obscenity, in that the ordinance is plainly not limited to specifically defined sexual conduct found to be patently offensive to the average person applying contemporary community standards, no requirement that the work taken as a

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3In this regard, see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

whole appeal to a prurient interest in sex, and contains no exception for performances of serious literary, artistic, political or scientific value.

Moreover, as far as a captive audience is concerned, this Court has repeatedly held that if an audience can avoid viewing, seeing or reading material it deems to be morally offensive, it is not "captive" for First Amendment purposes. See *Cohen v. California*, 403 U.S. 15 (1971); *Spence v. Washington*, 402 U.S. 405, 412 (1972); and *Erznoznik v. City of Jacksonville*, 422 U..S. 205 (1975). In *Erznoznik*, this Court specifically rejected a "captive audience" theory in a case involving the public display of nudity in drive-in motion picture theaters, this Court stating that anyone offended "can readily avert his eyes." Id. at 211.

Obviously, there is clearly no issue of a captive audience in this case. The only way a customer can view nude dance performance in Respondent's establishment is to pay admission to enter voluntarily. The audience is not even arguably "captive," as this Court has defined the term.

As a result, since the ordinance is facially directed at expression, and since the ordinance is not restricted to performances which are legally obscene or forced upon a captive audience, any attempt to justify the ordinance on the

basis of order or morality would render the ordinance unconstitutionally overbroad under the First Amendment. See *Erznoznik*, supra.[4]

II. THE ORDINANCE IN QUESTION CANNOT BE JUSTIFIED UNDER A "SECONDARY EFFECTS" THEORY.

A. THE "SECONDARY EFFECTS" THEORY OF JUSTICE SOUTER IS INCONSISTENT WITH THIS COURT'S HISTORICAL TREATMENT OF THE "SECONDARY EFFECTS" EXCEPTION TO THE PROHIBITION OF CONTENT-BASED DISCRIMINATION.

The use by Justice Souter of a "secondary effects" justification to support the requirement of furthering a substantial governmental interest in *Barnes*, has fostered wholesale confusion in the Circuit Courts as to the requisite

4In this regard, it should be noted that in *Barnes*, there was no facial overbreadth issue, since the Seventh Circuit had held the facial overbreadth issue to have been resolved in a prior state court proceeding. See 501 U.S. at 564, n.1. See also the concurring opinion of Justice Souter, Id. at 585, n.2 in which Justice Souter specifically notes that there was no facial overbreadth challenge before the Court in *Barnes* and strongly suggests that a facial overbreadth challenge might be sustained to legislation similar to the Indiana statute. Indeed, numerous courts have persuasively sustained overbreadth challenges to ordinances indistinguishable from the ordinance in the instant case, based upon facial overbreadth. See for example, *Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129 (6th Cir. 1994); *Lounge Management, Ltd. v. Town of Trenton*, 219 Wis. 2d 13, 580 N.W. 2d 156 (1998), cert. denied, ___U.S.___, 119 S. Ct. 511 (1998); and *Schultz v. City of Cumberland*, 26 F. Supp. 2d 1128 (W.D. Wis. 1998).

proof and application of "secondary effects." Prior to Souter's concurrence in *Barnes*, secondary effects were seen as harmful effects to the surrounding neighborhood of certain adult businesses, which effects justified the dispersal of those businesses from residential neighborhoods and other protected uses. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). Restricting a location of an adult business based on secondary effects does not deny access to protected expression such as nude dancing, because the venues to view the entertainment are still allowed, such restrictions only remove adult uses from the proximity to protected uses and even to other adult businesses.

The "secondary effects" doctrine is properly applied in the context of a time, place, or manner regulation which does not ban or deny access to expression. Because reasonable restrictions on the location of adult expression do not target the message for suppression, this Court has treated such restrictions as content neutral for consideration under the First Amendment. Similarly, identical restrictions on expression which is not the target of a governmental regulation are analyzed by the Court under the four-part formula of *United States v. O'Brien*, 391 U.S. 369 (1968).

The conceptual difficulty arises when *Renton's*

"secondary effects" justification is taken out of the time, place, and manner zoning context, and applied to prohibit conduct protected as expression. In that case, it is obvious that the particular "secondary effects" must shift from the concerns of protected uses to problems which occur where the expressive conduct is taking place. The effects on a particular neighborhood use are no longer relevant because the prohibition will prevent the use anywhere in the jurisdiction imposing the ban. Justice Souter's concurrence in *Barnes* indicates that what he means by secondary effects include prostitution, sexual assault, and associated crimes. *Barnes*, supra, 501 U.S. at 584. Souter J. concurring. Justice Souter's choice of examples refer to crime inside a nude dance and massage business. *U.S. v. Doerr*, 886 F. 2d 947, 949-950 (7th Cir. 1989); *U.S. Marron*, 890 F. 2d 924, 926 (7th cir. 1989). The fact that prostitution occurred at nightclubs that featured nude dancing was sufficient for him to uphold a ban on public nudity as applied to nude dancing. Candidly, Justice Souter recognized that the "secondary effects" he identified were not likely to be present at mainstream theater presentations which also featured nude performance. *Barnes*, supra 505 U.S. at 584, Souter, J. concurring.

The easy criticism of Justice Souter's use of "secondary

effects" to justify a ban encompassing nude performances is that when the concept of secondary effects changes from neighborhood impacts to violations occurring inside the business premise, the proof that most or many businesses that feature nude dancing have prostitution is never documented. No police or planning study is offered to show that what occurred in the nightclub examples Justice Souter cited are widespread, so that prostitution is linked to nude dance performances that regularly occur in "Renton type" nightclubs across the country. Justice Souter is making the unproven leap that, for example, because an adult bookstore had prostitution on the premises as in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), many or all adult bookstores have prostitution on the premises because they sell adult movies.[5] The occurrence of prostitution at a few adult bookstores to justify a ban on businesses that sell adult videos is clearly the same as using "secondary effects" to prohibit the retail marketing of adult motion pictures. Expression is to be denied at properly run adult businesses because a few violators allow criminal activities. With Justice Souter's use of secondary effects, protected expression is suppressed although law enforcement, licensing

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5As will be pointed out in the following section of the brief, the factual premises of Justice Souter's concurrence are not empirically justified.

and manner restrictions would no doubt alleviate the identified internal effects. "At least in *Renton* there was a plausible argument that the secondary effects sought to be regulated - the social decay of neighborhoods - could not be directly regulated in the way that congestion, visual clutter, or violence can be." *Boos v. Barry*, 485 U.S. 312, 337 (1988), Brennan, J. concurring. Justice Souter's "secondary effects" can be directly regulated and do not justify suppressing expression.

Indeed, to the extent that Justice Souter concludes that secondary effects can theoretically justify, not only locational restriction on nude dancing, but a total ban on nude dancing, it is directly contrary to the decision of this court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), when this Court reached exactly the opposite conclusion on the identical issue.

The Circuit Courts, in light of Justice Souter's concurrence in *Barnes* have repeatedly confused the nature and scope of a secondary effects, and, as alarmingly, the evidence required to be compiled by the legislative body to employ a secondary effects justification. In *Triplette Grille, Inc. v. City of Akron*, supra, 40 F. 3d 129, 135 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit reversed a District court's determination based on Justice Souter's requirement that a ban on nudity as applied to nude dancing must be based on a

secondary effects justification. "By requiring affirmative evidence of a secondary effects motivation, the District Court imposed a burden on the city that Justice Souter's opinion seems designed to avoid." See also *D.L.S. Inc. v City of Chattanooga*, 107 F. 3d 403, 410-411 (6th Cir. 1997). In response to the nightclub's argument that the legislature, under prior Sixth Circuit authority, must show that the llegisltature actually relied on evidence of secondary effects, the Court of Appeals replied that the precedent had been altered by controlling Supreme Court precedent, that is, Justice Souter's concurrence in *Barnes*. See also, *Farkas v. Miller*, 151 F. 3d 900 (8th Cir. 1998).

By contrast, the Fifth Circuit has adhered to *Renton's* requirement of evidence which reasonably (objectively) supports a legislative finding that a nude dance encompassing ban is justified through focus on secondary effects. *J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F. 3d 362 (5th Cir. 1998).

However, the Fifth Circuit in *J&B Entertainment* followed the Third Circuit in requiring only that a legislative record be compiled or that the governing body introduce evidence of a secondary effect concen in defense of an ordinance challenge. See *Phillips v. Borough of Keyport*, 107

F. 3d 164, 174-175 (3d Cir. 1997). The Fifth Circuit precedent prior to *J&B* did not allow the after-the-fact secondary effects proof. *SDJ, Inc. v. City of Houston*, 831 F. 2d 1268, 1274 (5th Cir. 1988). The change by allowing the defense to an ordinance challenge to articulate the "secondary effects" justification stems from Justice Souter's obviating the need for a legislative record to find a secondary effects jsutification as a current governmental interest. (*Barnes*, supra, 501 U.S. at 582, Souter, J. concurring). The flaw in the after-the-fact governmental justification is that pretext can be masked by evidence that does not change the fact that a legislative body was predominantly concerned with suppressing message or the content of expression at the time a regulation was enacted. This is the same problem that occurs when a discriminatory firing is sought to be justified by evidence later discovered that would have justified the otherwise illegal termination. Compare *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). What has been lost through the extension of a "secondary effects" justification from the zoning context to the indirect prohibition of nude dance expression is any mechanism to prevent governmental bodies from concocting a record, even though the true governmental purpose is to ban erotic dance due to societal distaste for this form of entertainment. What is

to prevent the government from using biased studies to suggest a governmental justification that was not remotely considered by the legislative body? Would the courts not be unable to question the "studies showing secondary effects" because the truth of the studies is not for the courts?

Indeed, in a total perversion of a "secondary effects" doctrine, the Seventh Circuit has now held that "objective truth" is irrelevant and that regulations may be imposed upon adult entertainment establishments, even when the undisputed evidence before the Court indicates that such establishment causes no adverse secondary effects. See the unpublished opinion in *DiMa Corp. v. Town of Hallie*, 185 F. 3d 823 (7th Cir. 1999), 1999 U.S. App. LEXIS 20301.[6]

B. THE "SECONDARY EFFECTS JUSTIFICATION IS NOT FACTUALLY JUSTIFIED.

1. AVAILABLE EVIDENCE DOES NOT JUSTIFY ANY FINDING THAT NUDE DANCE ENTERTAINMENT CAUSES ADVERSE SECONDARY EFFECTS.

6The Supreme Court of South Carolina has reached a similar amazing result, holding adult entertainment businesses to be subject to regulations closing them down at existing locations, notwithstanding an undisputed record of no secondary effects having been caused. See *Restaurant Row Associates v. Horry County*, 516 S.E. 2d 442 (S.C. May 17, 1999), petition for cert. pending.

In advancing the "secondary effects justification for Indiana's proscription of public nudity in *Barnes*, Justice Souter admittedly did so without any evidence in the record suggesting that nude dancing per se causes such adverse secondary effects, nor even that the Indiana legislature in fact relied on such a "secondary effects" justification in enacting the statute.[7] In justification of that position, Justice Souter stated:

> "The type of entertainment Respondents seek to provide is plainly of the same character as that at issue in *Renton*, [*Young v. American Mini-Theaters, Inc.*, 427 U.S. 50 (1976)], and [*California v. LaRue*, 409 U.S. 109 (1972)]. It is therefore no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*. Other reported cases from the Circuit in which this litigation arose confirm the conclusion. See, e.g., *United States v. Marron*, 890 F. 2d 924, 926 (7th Cir. 1989) (prostitution associated with nude dancing establishment); *United States v. Doerr*, 886 F. 2d 944, 949 (7th Cir. 1989) (same). In light of *Renton's* recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects, the State of Indiana could reasonably conclude that forbidding nude entertainment of a type offered at the Kitty Kat Lounge and the Glen Theatres 'bookstore' furthers its interest in preventing prostitution, sexual assault and associated crime." 501 U.S. at 584, Souter J., concurring.

To begin with, both of the reported Seventh Circuit cases relied upon by Justice Souter, to-wit: *United States v. Marron*, supra, 890 F. 2d 924 (7th Cir. 1989), and *United States v. Doerr*, supra, 886 F. 2d 944 (7th Cir. 1989), involved an F.B.I. sting operation known as "operation safe bet," in which the F.B.I. operated a credit card service and investigated various businesses offering prostitution service on credit cards, three of which involved nude dance clubs. However, the fact that prostitution was found to have occurred at three nude dance clubs, subject to a sting operation no more implies that nude dance clubs are loci of prostitution any more than the fact that prostitution arrests occur at any of a number of locations including a Ford Motor Company plant, a convenience store, motels, school parking lots and numerous private residences in

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7See 501 U.S. at 582, Souter J. concurring, stating that the Court's appropriate focus was "not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." This is clearly contrary to the position adopted subsequently by this Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996), in which it stated that governmental justifications "must genuine, not hypothesized or invented post hoc in response to litigation."

all kinds of neighborhoods.[8]

Moreover, Justice Souter's opinion, in essence amounts to the Court taking judicial notice of the supposed "fact" that nude dance entertainment necessarily results in adverse secondary effects. There are essentially two problems with such use of judicial notice. First of all, judicial notice should only be applied to adjudicative facts, not legislative facts. See Fed. R. Evid. 201(a). More significantly, Fed. R. Evid. 201(b) specifically provides as follows:

> "A judicially noticed fact must be one not subject to reasonable dispute that is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The notion that nude dance entertainment causes adverse secondary effects satisfies neither of the foregoing tests of judicial notice. See the paper prepared by Dr. Daniel Linz of the University of California Santa Barbara, set forth in the Appendix at A.1-A.58. In that paper Dr. Linz specifically reviews the major so-called "studies" which purport to link

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8Set forth in the Appendix at A.72-A.74 is a compendium of published reports of various loci of prostitution, setting forth all of the foregoing as places in which prostitution has occurred.

adult entertainment an adverse secondary effects, such as an increase in crime and a decline in property values. As noted by Dr. Linz absolutely none of the studies that purport to find such a connection have been conducted with methodology sound enough even to satisfy the minimal requirements of reliability for admission into evidence, pursuant to this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. Ltd., v. Charmichael*, ___U.S.___, 119 S. Ct. 1167 (May 23, 1999). Deficiencies in these studies include the use of subjective survey data when more reliable empirical evidence is available; failure to follow methodologically sound practices in selecting control areas; and use of survey techniques designed to distort and bias the surveys findings.[9]

Perhaps even more significantly, available evidence plainly suggests that where studies of the relationship between adult entertainment and secondary effects have been done in a scientifically sound manner, no relationship has been found to exist. See for example, the discussion of the April, 1978 study in St. Paul, Minnesota, in which the presence of "adult entertainment" and secondary effects, such as a decline in

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9See appendix at A.14 - A.27. See also Table 2 at A.58.

property values, and an increase in criminal activity, were compared for various census tracts throughout the city in 1970 and 1976. While the study found a positive relationship between the presence of "adult entertainment" and the above-mentioned adverse secondary effects, the study took pains to note that the term "adult entertainment" had been defined to include both sexually oriented businesses and alcohol-serving businesses. However, when sexually oriented businesses were studied, no relationship existed, either in 1970 or 1976, between the presence of sexually oriented businesses and an increase in crime or a decline in property values. See Appendix at A.13-A.14.[10]

Finally, Dr. Linz notes that even those studies frequently

10See also the study conducted by the police department in Fulton County, Georgia, excerpts of which are set forth in the Appendix at A.59-A.71, in which the county, in a deliberate attempt to justify restrictions on nudity in establishments licensed to sell alcohol, directed its police department to compare crime statistics between alcohol-serving establishments with or without nude dance entertainment. Much to the chagrin of the County Board, the police department reported back that not only did alcohol-serving establishments with nude dance activity not have more police calls and more reports of criminal activity, they had substantially fewer such reports. The Fulton County police reluctantly concluded that "there is no statistical correlation that shows an increase in crime at adult entertainment establishments that serve alcoholic beverages. However, there is a statistical correlation that would indicate there is a greater instances (sic) of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages." Appendix at A.71.

cited as proof for the connection between adult entertainment businesses and adverse secondary effects in fact demonstrate exactly the opposite conclusion, in those portions of the studies done in compliance with the principals mandated by this Court in *Daubert* and *Kumho Tires*. For example, in the Los Angeles study of property values, at least two study areas (areas containing adult businesses) had property values decline at a lesser rate or increase at a greater rate than comparable areas without adult entertainment businesses. This led the researchers to conclude that there is "insufficient evidence to support the contention that concentration of sex oriented businesses have been the primary cause of these patterns of changes in assessed evaluations between 1970 and 1976." Appendix at. A.16. Similarly, in the Indianapolis study again frequently cited as demonstrating a relationship between adult entertainment businesses and crime, the sub-area analysis, involving crime rates within 1,000 feet of adult entertainment businesses, as compared to those within a 1,000 foot radius of a random centroid in the control areas, revealed a greater rate of increase in crime in the control areas than in the areas around the adult entertainment business. Id. at A.23-A.24.

In the early years of this millennium, we all knew that the sun revolved around the earth, and that if one sailed to the

horizon, one would fall off the edge of planet. We changed our mind about those positions when we examined the facts, which disproved our earlier determination.

This Court has had the identical experience. Last century, this Court knew that separate but equal was in full compliance with the United States Constitution. *Plessy v. Ferguson*, 163 U.S. 537 (1896). This Court changed its mind when it objectively looked at that facts and realized that its earlier determination was based upon a flawed view of the facts. See *Brown v. Board of Education*, 347 U.S. 483 (1954). This case presents the identical situation. The Souter concurrence in *Barnes* suggests that we "know" that adult entertainment causes adverse secondary effects. As the appendices to this brief indicate, objectively verifiable facts do not support this clearly erroneous position, and this Court must be willing to reevaluate the issue and render a decision based upon facts, not fantasy.[11]

2. EVEN ASSUMING THE EVIDENCE SUPPORTED THE PROPOSITION THAT ADULT BUSINESSES CAUSE ADVERSE SECONDARY EFFECTS, THERE IS NO EVIDENCE PROHIBITIONS OF PUBLIC NUDITY WOULD SIGNIFICANTLY ADVANCE THE GOVERNMENT'S INTEREST IN

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11 The only alternative is to adopt the clearly absurd position of the Seventh Circuit that "objective truth" is irrelevant, a position clearly contrary to this Court's holding in *U.S. v. Carolene Products, Co.*, 304 U.S. 144 (1938).

CURBING SUCH EFFECTS.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), this Court applied a test for regulating commercial speech, a test extremely similar to the test for regulating conduct containing a speech component or a time, place, and manner regulation of speech.[12] In that case, this Court noted:

> "In *Edenfield [v. Fane*, 507 U.S. 761 (1993)], we decided that the Government carries the burden of showing that the challenged regulation advances the government's interest 'in a direct and a material way' [Citation omitted.] That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain such a restriction commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' [Citation omitted.] We caution that this requirement was critical; otherwise 'a State could with ease restrict commercial speech in the service of other objectives that could not

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12 Compare the tests for regulating commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980), the test for incidental regulation of speech under *O'Brien*, supra, 391 U.S. 367 (1968), and the test for time, place and manner regulation of speech contained in *Renton*, supra, 475 U.S. 41, and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), plainly indicates the test to be extremely similar. Indeed, in *Clark v. Community for Creative Non-Violence*, 458 U.S. 288 (1984), this Court indicated that the *O'Brien* test is "in the last analysis, little, if any, different from the standard applied to time, place or manner restrictions."

themselves justify a burden on commercial expression.'[13]

Neither the record in this case nor any stretch of logic can conceivably yield the conclusion that the prescribed remedy in this ordinance, to-wit: the requirement of pasties and G-strings or some other measure of clothing, will advance the state's interest in preventing criminal activity or a decline in property values at all, much less ameliorate those secondary effects "in a direct and material way," as this Court's decisions have plainly mandated. Several courts which have attempted a serious analysis of this Court's opinion in *Barnes* have clearly reached this unavoidable conclusion. In *Nakotomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997), in discussing the furtherance of the governmental interest, the court in that case noted:

> "Moreover, to pass constitutional muster under *O'Brien*, which Justice Souter acknowledges articulates the appropriate test, Indiana's statute, requiring that erotic dancers wear pasties and G-strings, must somehow further Indiana's interest in reducing prostitution and drug use (emphasis by the court). To-wit:

13More recently, in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), both the plurality opinion and the plurality opinion of Justice O'Connor emphasized the exacting scrutiny to which the remedy of a restriction on commercial speech would be placed.

> Indiana must demonstrate that its regulatory scheme, at minimum, makes sense based on the objectives to be obtained. This is not to say that a governmental entity must isolate the precise causes of the correlation between the regulated activity and the detrimental secondary effect. However, where government is seeking to restrain the free expression of its citizens, the Supreme Court has invariably held that the burden falls on the government to justify the infringement. [Citations omitted.]
>
> Recognizing this important requirement, the plurality in *Barnes* was careful to note that Indiana's interest in order and morality was furthered by directly banning the 'evil' itself: nudity. [Emphasis by the court, citation omitted.] In comparison, the 'evil' that Justice Souter addresses is 'prostitution, sexual assault, and other criminal activity.' [Citation omitted.] Clearly, the government has the power to ban prostitution, drug use, and sexual assault. Indeed, better enforcement of existing laws against prostitution and drug use will undoubtedly further the government's interest in reducing these activities. However, if the government seeks to indirectly address these same evils by requiring that dancers engaged in expressive First Amendment activity wear pasties and G-strings, the Constitution requires that there be some connection between the restriction and the evil sought to be eradicated (emphasis by the court)." Id. at 996-997.

The court then concludes:

"In Justice Souter's concurring opinion in *Barnes*, there is simply no mention of how Indiana's indecency statute, requiring that erotic dancers partially cover their breasts and buttocks, will reduce the incidents of prostitution, drug use, and sexual assault. This oversight is most likely due to the fact, that this Court has found here, that no logical relationship exists between the percent of a woman's breast that is visible (in *Barnes* Indiana simply required the covering of the nipple) and the number of prostitutes operating outside an adult establishment." Id. at 997-998.[14]

Most recently, in *Diva's, Inc. v. City of Bangor*, 21 F. Supp. 2d 60 (D. Me. 1998), the court issued both a preliminary and permanent injunction against the enforcement of a municipal ordinance prohibiting the owner of a commercial establishment offering nude dancing from also operating an escort service, dating service, or booking agency within the county. The court enjoined enforcement of the ordinance, inter alia because of the absence of any showing that the goal of reducing crime and prostitution would be at all furthered by

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14Several other courts have precisively reached the same conclusion. See for example, *Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12-13 (S.D. Miss. 1994), and *Books, Inc. v. Pottawattamie County, Ia.*, 978 F. Supp. 1247 (S.D. Ia. 1997).

prohibiting the owner of nude dancing establishments from also operating booking agencies. The court noted:

> "The City claims that it is entitled to rely on studies from other cities to support its action, and points to the legislative record which contains studies conducted in Texas, New York, Minnesota and other states. The Court agrees that the City may base its action, at least in part, on evidence from other communities [Citation omitted.] The studies relied upon by the city here, however, do not address the connection between co-ownership of a booking agency and a nude dancing establishment and prostitution. Rather, these studies support no more than the proposition that nude dancing establishments alone may be associated with certain crimes, including prostitution. Furthermore, these studies focus only on the efficacy of land use and zoning schemes in reducing crime. None documents, or even mentions, the efficacy of an ordinance of the type enacted by the City of Bangor in reducing prostitution or any other crime." Id. at 65.

Consequently, even assuming the reliability of the studies set forth in the Linz paper, at best those studies would support locational zoning restrictions on adult entertainment establishments. Nothing in those studies, none of which were apparently relied upon by the City of Erie in enacting the present ordinance, even remotely suggests that the incidence of prostitution and drug use in adult entertainment establishments

would be even remotely affected by the percentage of a dancer's breast and buttocks subject to covering.

CONCLUSION

Because the ordinance in the instant case was not enacted as a general ban on nudity, but rather was expressly enacted for the purpose of curtailing nude dancing, recognized by this Court to be within the perimeters of the First Amendment, it cannot be justified on the statute's interest in "order and morality." Because secondary effects have only been used to justify time, place, and manner regulations of protected speech and not a total ban on such speech, because the evidence supporting such secondary effects is either unreliable or does not support the proposition that adult entertainment causes adverse secondary effects, and because there has been no showing that the chosen remedy, a prohibition on nude dancing, will advance the government's interest in preventing secondary effects in a direct and material way, it is clear that the Supreme Court of Pennsylvania was absolutely correct when it declared:

> "[T]he Ordinance is inextricably linked with the content motivation to suppress the expressive nature of nude dancing." *Pap's A.M. v. City of Erie*, 719 A. 2d 273, 279 (Pa. 1988).

Because neither Petitioner nor the amici in support of reversal have offered any compelling evidence to support a

content-based restriction which this ordinance plainly is, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

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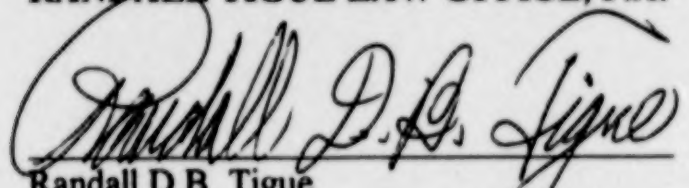

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PAPER ON THE "SECONDARY EFFECTS STUDIES" RELIED UPON BY GOVERNMENTAL BODIES WHEN ENACTING LEGISLATION TO REGULATE "ADULT" BUSINESSES

PRESENTED IN SUPPORT OF THE AMICUS CURIAE BRIEF OF THE FIRST AMENDMENT LAWYER'S ASSOCIATION

INTRODUCTION AND SUMMARY

In order to establish a sufficient basis for the zoning of "adult" entertainment businesses, governmental bodies rely upon the association of "secondary effects" to such facilities as justification for enacting such regulations. Among the most important potential effects considered by local governments have been increases in neighborhood crime rates and decreases in surrounding property values.

A number of cities, counties, and states have undertaken investigations intended to establish the presence of such secondary effects and their connection to adult facilities. These "secondary effects studies," as we shall call them, generally serve as the basis for claims that adult establishments engender harmful secondary problems. And, this Court has stated that a municipality need not conduct new studies of these effects before adopting laws designed to ameliorate the same, "so long as whatever evidence the City relies upon is believed to be relevant to the problem that the City addresses." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986) (emphasis added).

The "evidence" which most municipalities rely upon as justification for enacting regulations of adult businesses, rather than conducting their own studies or investigations, are these secondary effects studies. Succinctly put, many local governments across the United States have relied on this body of research (e.g., "studies" carried out by other municipalities) as evidence of the secondary effects of adult businesses. In most cases, cities and other governmental agencies have used the experiences of a limited number of other locales with adult businesses as a rationale for instituting regulation of such businesses in their own communities.

Since a core set of studies have been, and continue to be, relied upon by hundreds of local municipalities as evidence of negative secondary effects, a central concern must be the methodological rigor, and therefore trustworthiness, of these studies. In addition, the applicability of these studies in regard to the efficacy of any particular regulation must be evaluated as well. This is particularly true in that the precedent of this Court has established that a municipality must establish that such regulations are necessary to further the governmental interest of ameliorating secondary effects, and that such regulations are no broader than is essential to the furtherance of such interest. *Renton; United States v. O'Brien*, 391 U.S. 367, 377 (1968).

To aid this Court in evaluating the validity, and applicability to the case at hand, of the secondary effects studies cited by communities across the country, this paper will abstract and analyze the methodology and major empirical findings in the relevant research. As we will demonstrate, with few exceptions, the most frequently used studies are seriously and often fatally

methodologically flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry, and nearly universally fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses, or a reversal of the presumed negative effect.

ANALYSIS

I. Local Governments Attempting to Regulate Adult Businesses Rely on a Core Set of Frequently Cited Scientific Studies of Secondary Effects.

We have reviewed a large body of laws enacted for the regulation of adult entertainment businesses, and have amassed as many as possible of the empirical and non-empirical reports examining potential secondary effects of such businesses produced or purportedly relied upon by municipalities considering the issue. Often, the laws --usually municipal ordinances -- contain "preambles" that specifically set forth which of the various "secondary effects studies" the municipality is relying on as justification for enacting the particular regulation. Presumably, these studies are listed in order to comply with the *Renton* requirement that a municipality rely upon evidence "reasonably believed to be relevant to the problem that the City addresses." 475 U.S. at 51-52.

The ten most frequently cited reports in these preambles to the regulations that we have amassed, and a representative list

of some of the communities that have stated that they have relied upon them in enacting regulations of adult businesses, are set forth in Table 1. We made every effort to secure as many of these municipal reports as possible. These reports were originally obtained by contacting communities and municipalities known to have addressed the issue of government regulation of adult businesses. Although it is more than likely we have not included in our review every single "secondary effects study" that may exist, we have obtained a quite large and representative number of such reports. From our review of the literature, we are confident that we have collected and analyzed the vast majority of "studies" that communities purport to rely upon when enacting regulations of adult businesses.

For purposes of this paper, we consider in detail what we have found to be the four most frequently cited (and relied upon) studies of secondary effects: Indianapolis, IN (1984), Phoenix, AZ (1979), and Los Angeles, CA (1977), and St. Paul, MN (1978). It should be noted, however, that the problems that we have found in these four reports in regard to misunderstandings of their "findings" and methodological failings (which we discuss in detail below), pertain as well to the next six most frequently relied upon reports. We discuss these next six studies in brief at the end of this paper. Accordingly, the concerns that we outline below apply to all of the "top ten" relied upon "secondary effects studies." And, virtually all of the reports that we have analyzed have these same failings, often because they themselves relied upon earlier "studies" that contained the flaws discussed below.

II. The Basic Requirements for the Acceptance of Scientific Evidence -- Such as "Secondary Effects Studies" Produced by Indianapolis, Phoenix, Los Angeles, and St. Paul -- Have Been Prescribed by this Court in *Daubert v. Merrell Dow*, 509 U.S. 579 (1993). Among These Requirements are the Calculation of an Error Rate and Adherence to Professional Standards.

In an attempt to prevent the proliferation in courtrooms of what Peter Huber has called "junk science," this Court in *Daubert*, in an opinion authored by Justice Blackmun, held that there are limits on the admissibility of scientific evidence offered by "expert witnesses" in federal courts. The Court opined that scientific knowledge must be grounded "in the methods and procedures of science" and must be based on more than "subjective belief or unsupported speculation." 509 U.S. at 590. Thus, the Court said, "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." Id. In a footnote, the Court observes that "[i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity." 509 U.S. 590 n. 9. Offering "some general observations" as to how this connection can be made, the Court provided a list of factors that federal judges could consider in ruling on a proffer of expert scientific testimony.

1. The "key question" is whether the theory or technique under scrutiny is testable, borrowing Karl Popper's notion of falsifiability.
2. Although publication was not an absolute essential, the Court noted that peer review and publication increased "the likelihood that substantive flaws in methodology will be detected."

3. Error rate.
4. Adherence to professional standards in using the technique in question.
5. And, finally, though not the sole or even the primary test, general acceptance could "have a bearing on the inquiry". 509 U.S. at 593-94.

While it may not be necessary to hold municipalities to each of these considerations when weighing the validity of evidence substantiating the existence of secondary effects in connection with adult businesses, at least two factors are indispensable. We presume that it is at least a testable proposition that secondary effects may exist, or else a study would not have been undertaken in the first place. We can further presume that a lengthy peer review and publication process may be unlikely due to urgency when communities tend to address these issues. In addition, the general acceptance requirement is held to have a bearing but is not an essential consideration. The third and fourth factors, however, the calculation of an error rate and adherence to professional standards in using techniques or procedures, need to be applied to these studies in order to ensure "evidentiary reliability." Without this reliability, there is no basis to determine whether there is a substantial or important governmental interest involved, whether a specific piece of legislation is "necessary" in order to further that interest, or whether it is "reasonable" for a municipality to rely upon such a study as a basis for enacting legislation.

In a scientific study, the error rate refers to the probability of accepting a result as true, when in fact it is false.

It is an indication of the reliability of a finding. An error rate is determined by first calculating an estimation of a population characteristic (a statistic) that summarizes the data that has been collected, and then asking how likely it is that that statistical value would be obtained by chance alone. The error rate is the degree of chance a scientist will allow. In the social sciences it is conventional to set the error rate at five percent or less (i.e., we will tolerate an error rate of 5 times out of 100 the results may be obtained by chance).

Unless certain assumptions are met, statistical tests cannot be applied to the data and an error rate cannot be calculated. Most important of these assumptions in regard to, for example, survey research, is that the units of analysis (e.g., survey respondents) are randomly selected from the population, or in regard to an experiment, that the units of analysis (e.g., subjects) are randomly assigned to experimental and control or comparison groups. The results of properly conducted experiments and surveys are always couched in terms of an error rate.

In many cases, especially in field research, it is not possible to randomly assign units of analysis to an experimental group and a control group. This is universally true of "secondary effects" studies (e.g., it is not possible to randomly assign adult businesses to some neighborhoods and hold other neighborhoods as controls). When this is the case, adherence to a set of professional standards that have been devised by scientists in a particular area of inquiry to insure methodological integrity and thus the validity of a study is all the more necessary. These standards vary somewhat depending on the

area of inquiry or social science discipline, but they are generally known as professional standards for conducting "quasi-experiments."

III. In Order to Calculate an Acceptable Error Rate and Adhere to Professional Standards, a Study Purporting to Measure Secondary Effects Must: A) Include a Control Area That is Equivalent to the Study Area; B) Include a Sufficient Period of Time Both Prior to and Following the Establishment of an Adult Entertainment Business in a Community to Ensure that the Study is not Detecting an Erratic Pattern of Activity; C) Measure the Crime Rate According to the Same Valid Source for Both Areas; and D) Properly Conduct Survey Research in Accordance With Professional Standards.

The following four criteria are crucial in insuring that a scientifically valid study of secondary effects has been conducted:

A. In order to insure accurate and fair comparisons, a control area must be selected that is truly "equivalent" to the area containing the adult entertainment business(es). Since most studies of secondary effects attempt to uncover increases in crime or neighborhood economic deterioration, professional standards dictate that the control (non-adult) site must be comparable (matched) with the study (adult) site on variables related to crime and deterioration. Ideally, this matching should occur on neighborhood characteristics measured before the adult business has located in the study area. Of particular importance are that the study and control areas are matched for crime rate,

and ethnicity and socioeconomic status of individuals in both areas. Additionally, economic factors, such as median home value, and total individuals employed and unemployed, should be comparable in both areas. A concerted effort should also be made to include only comparison areas with similar real estate market characteristics including property values, rental rates, and proportion of unused commercial and industrial space in either area. The study and control areas should be approximately equal in total population. Finally, because of the effect of businesses that serve alcoholic beverages on increases in crime and neighborhood deterioration, the study and control area should be matched on the presence of alcohol serving establishments.

B. A sufficient period of elapsed time, both prior to and following the establishment of an adult entertainment business, is necessary when compiling data in order to ensure that the study is not merely detecting an erratic pattern of social activity. Most methodologically sound, quasi-experimental, time-series analyses rely on at least a one year period prior to and after the introduction of the event under study to test for significant changes. Generally, the longer the time period before and after the event under consideration, the more stable (and more valid) the estimates of the event's effects tend to be.

C. The crime rate must be measured according to the same valid source for all areas considered. Studies on secondary effects typically focus on two general types of crime in relation to adult entertainment businesses. These two types of crime are "general criminal activity" (including, but not limited to, robbery, theft, assault, disorderly conduct, and breaking and

entering) and "crimes of a sexual nature" (including, but not limited to, rape, prostitution, child molestation, and indecent public exposure). First, it is especially important that the measurement of these crimes is based on the same information source for both sites and throughout the entire study period. For example, if the study area measures crime by the number and type of calls made to the police department, the control area must also rely on such a measure when the two areas are compared.

In addition, the crime information source must be factually valid and reliable such as a daily log kept by police, or a compilation of the number of arrests. Many studies claim to measure area crime by asking survey respondents about their estimates of the likelihood of being a victim of crime. Such data is not preferred because of its subjectivity and, as such, cannot be trusted as a valid representation of actual criminal activity in a particular area. As social scientists, we would hesitate to rely upon such "evidence" to establish a causal link between adult businesses and secondary effects. From our review of *Daubert*, we believe such information may not have sufficient "trustworthiness" to be admissible in a federal court of law. However, if such subjective opinion research on crime is to be undertaken it must conform to the standards for conducting reliable and valid survey research (these standards are described in D immediately below).

Researchers must also acknowledge any change in police surveillance techniques once an adult entertainment business has been established in a particular community. Obviously, increased surveillance of an area simply because an adult

business is located there will have an impact on the amount of crime detected by the police. If increased police surveillance and the opening of an adult business in a particular area are confounded in this way, it is impossible to tell whether crime has increased due to the presence of the adult entertainment business or simply because of the increased police activity.

D. Finally, survey research, if relevant to the question at all, must be properly conducted. Most survey research in this area involves asking real estate professionals, local property owners, and/or law enforcement officers and community residents to estimate the effect of the presence of an adult entertainment business on a particular community. Less frequently, surveys of citizens' perception of crime and victimization are also undertaken. While subjective surveys may provide us with a sense of the general opinion of a particular group regarding the impact of adult entertainment businesses on surrounding neighborhood property values or criminal activity, they do not provide sound evidence of a relationship between these businesses and the actual impacts on the surrounding areas. For instance, while the opinions of real estate professionals are legitimate and important, they have a particularly strong interest in the issue, and as such, may produce biased results.

Survey evidence is not comparable to, nor can it replace, the evidence supplied by objective comparisons of (for example) property values and/or crime statistics compiled by the police within areas containing adult entertainment businesses, with property values or crime statistics within areas containing no such businesses. Such a comparative analysis is the preferable

social scientific means by which to establish a relationship between the presence of adult entertainment businesses and either decreases in property values or increases in crime for the surrounding areas.

In addition, even if some survey research may be relevant to the issue at hand, it must be properly conducted in order for the researcher to calculate an error rate. Professional standards do exist for performing methodologically valid social scientific survey research so that it possesses some degree of reliability and trustworthiness. Adherence to these standards is essential if researchers hope to obtain legitimate unbiased survey results. First, it is important to ensure that a random sample of potential respondents is included in the study. Second, a sufficient response rate must be reached (at least 70-75% should be returned according to many experts) and those who do respond must not be a biased sub-portion of the sample. Finally, there must be a sufficient number of respondents to provide a stable statistical estimate.

IV. Three Out of the Four Most Frequently Relied Upon Studies Purporting to Demonstrate Negative Secondary Effects -- Indianapolis, IN (1984), Phoenix, AZ (1979), and Los Angeles, CA (1977) -- are Invalid According to the *Daubert* Standard. More Importantly, the Fourth Study, St. Paul, MN (1978), Which was Conducted in the Most Methodologically Sound Manner, Shows No Negative Secondary Effects. Yet, Each of These "Studies" is Repeatedly Cited by Municipalities as Justification for Enacting Regulations that are Intended to Address These Supposed Secondary Effects Problems.

The four most frequently cited studies and the degree to which they are scientifically valid are summarized in Table 2. We describe each of the studies below, including their actual findings and conclusions as well as their methodological strengths and weaknesses, in reverse order of how often they are cited by municipalities.

A. St. Paul, Minnesota: Neighborhood deterioration and the location of adult entertainment establishments in St. Paul. (1978).

SUMMARY: This study represents the most methodologically sound of all of the empirical research we reviewed. Most importantly (and most interestingly given the number of cities that cite it as justification for passing regulations designed to combat secondary effects), this study does not claim to have found any support for the existence of a relationship between sexually oriented adult entertainment businesses and negative secondary effects.

This study was methodologically stronger than most others for at least two reasons. First, the researchers examined all 76 census tracts within the St Paul region. They compared all tracts containing adult entertainment establishments with all of those that did not. As such, the study examined the entire geographical "study universe," negating the need for random assignment of control areas or the appropriate matching of selected control areas to the study area. Second, the study, which compared levels of neighborhood deterioration for study and control areas, maintained a substantial time lag between the first measures of deterioration and the second. Deterioration

was determined by examining crime counts, housing values, and market and legal influences over the study period. Therefore, changes in neighborhood climate between the first and second measures are more likely representative of reliable neighborhood changes rather than erratic fluctuations in social activity.

The most important aspect of this study is that it found absolutely no relationship between sexually oriented businesses and neighborhood deterioration. In fact, the study found that the only factor that was predictive of neighborhood deterioration was whether an alcohol serving establishment was operating within the area. Interestingly, however, no relationship was found to exist between neighborhood deterioration and the presence of establishments that served alcoholic beverages and offered live nude entertainment. Reliance upon this study as justification for enacting regulations of adult businesses in order to curb secondary effects is therefore misplaced.

B. Los Angeles, California; Study of the effects of the concentration of adult entertainment establishments in the City of Los Angeles. (1977)

SUMMARY: This study is perhaps the most often incorrectly referenced of any empirical research investigating the effects of adult oriented businesses on surrounding areas. In fact, although it is the third most relied upon piece of research that we have found supposedly establishing the relationship between adult oriented businesses and negative social repercussions, the researchers actually never claim any significant support for such a connection. As with the St. Paul

study described above, reliance upon this study as justification for enacting regulations of adult businesses in order to curb secondary effects is therefore misplaced.

The study report consists of four parts.

1. In the first part of the study, the researchers openly admit that they found no evidence of a relationship between the operation of adult entertainment businesses and potential negative effects. These conclusions were based on the results of a comparison of the average property value changes for five study areas and four control areas. Each of the five study areas was chosen because it contained a known cluster of adult entertainment businesses. The four control areas were chosen because of their proximity and supposed similarity to at least one of the study areas, and because they did not have an adult entertainment business operating within their borders. All of the study and control areas were in Hollywood, Studio City, or North Hollywood.

The researchers reported that it was difficult to find any consistent increase or decrease in property values associated with adult businesses. Results of the comparisons found that while study and control areas "1" both decreased in average value, there was a far larger decrease in the control (non-adult) area. Such a result is contrary to the assumption underlying the secondary effects doctrine (that adult establishments themselves cause a decrease in property values). Similarly, study (adult) area "2" increased in value by more than 400% over its comparable control (non-adult) area. Again, this result is directly opposite to what one would expect to see by assuming

a connection between adult businesses and secondary effects. Given these objective findings, the researchers stated that there is "...insufficient evidence to support the contention that concentrations of sex oriented businesses have been the primary cause of these patterns of change in assessed valuations between 1970 and 1976." It seems that those who have incorrectly referenced this study as supporting the relationship between adult entertainment businesses and lower property rates have simply disregarded the preceding statement by the study's authors.

2. The second part of the Los Angeles study claims to have found that survey results suggest that public opinion is strongly opposed to the operation of adult businesses. Yet, such a "study" does nothing more than attempt to gauge subjective opinions, and does not then serve to answer the question of whether adult businesses actually cause secondary effects. In addition, even in this subjective endeavor, the researchers failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques--most importantly, they failed to obtain a random sample of respondents. Without adherence to the requirement that a random sample of respondents be obtained, the study authors cannot calculate an error rate and the reliability of the results cannot be determined. Instead, the authors are left with a non-random survey of the opinions of a potentially biased group of property owners and real estate professionals who lived and/or worked within 500 feet of an adult entertainment business. Such a "survey" offers no insight as to whether adult establishments engender secondary effects and is not even representative of the broader public opinion on the issue.

3. In the third part of the Los Angeles study, the researchers openly acknowledge that they found no significant differences in crime rates between the census tracts encompassing the areas containing adult entertainment businesses and areas containing no such establishments. This part of the study consisted of an examination of the crime and population statistics for each of the census tracts containing clusters of adult entertainment businesses. Only tracts containing the clusters of adult businesses considered within the study areas for the first part of the study (already discussed) were considered. These data were then compared to those obtained from the census tracts containing each of the comparison control (non-adult) areas used in the first part of the study. Both sets of data were analyzed and compared over time in order to determine any significant differences concerning crime rates. The study authors concluded that in general, there were no significant differences in crime rates between the census tracts encompassing the study (adult) and control (non-adult) areas, and that no firm conclusions relevant to the study could be developed.

4. The final part of the Los Angeles study involved a "special" police study of the areas of Hollywood containing clusters of adult entertainment businesses. However, the researchers failed to adhere to even the most basic and rudimentary professional standards by failing to attempt to make a comparison of crime statistics in these areas with those in comparable control (non-adult) areas. Most importantly, the researchers failed to compare the areas surrounding adult businesses with comparable control (non-adult) areas. In addition, the researchers admitted to a substantial change in

police surveillance of the area under study, which renders any results at least suspect, and most likely meaningless. Although the findings of this study suggested high levels of criminal activity within these clusters, any implication that this is connected to the presence of adult businesses is invalidated by the fact that the researchers admitted to "stepped up" surveillance within these areas. Put simply, the police most likely found greater amounts of crime in the adult establishment areas because they were trying harder to find it. These failings and problems take this portion of the study outside of the reliability criteria of *Daubert*.

C. Phoenix, Arizona; Relation of criminal activity and adult businesses. (1979)

SUMMARY: This report presents the findings of a study performed in the city of Phoenix, Arizona that attempted to examine the relationship between adult entertainment businesses and local crime rates. This study claimed to find higher overall crime rates in study areas containing adult oriented businesses compared to control areas containing no such businesses. However, the evidence of negative secondary effects was equivocal at best. In addition, the study fails to adhere to professional standards because the control sites are not sufficiently comparable with the study site, and there was not a sufficient period of time, both prior to and following the establishment of an adult entertainment business, for the collection of data necessary to ensure that the study is not merely detecting an erratic pattern of social activity.

The researchers selected three geographically diverse

study areas, each comprised of one census tract in which at least one adult entertainment business was in operation. They further selected three control (non-adult) tracts located directly adjacent to the study tract. An attempt was made match each of the three control areas with the study areas on several dimensions. These included: a) Number of buildings built since 1950; b) median family income; c) median population age; d) percentage of acreage used residentially; and e) percentage of population that was non-white. It is essential that the selected study and control areas be accurately matched. The matching of study and control census tracts for this study was unacceptable, however. The median income for study area 1 was 30% lower than that in the matching control; control area 1 had a substantially greater number of buildings built since 1950 than the corresponding study area; and study areas 2 and 3 each had significantly lower median income levels than did their matching control areas. Since income and crime levels are generally inversely related we might expect to see higher crime rates with lower income irrespective of the presence of adult businesses. These failures to sufficiently match the study and control areas suggest that this study does not adhere to acceptable professional standards for scientific research.

In addition, there was an insufficient period of time, both prior to and following the establishment of an adult entertainment business for reliable measures of crime or economic deterioration to be obtained. The study only looked at crime rates for a one year period. Because of the extremely short period of time, we cannot be sure that the study is not merely detecting an erratic pattern of social activity.

Finally, although the study findings suggested that overall crime rates were higher in each of the study areas than those for each matching control area, a composite index of "violent crimes," which included murder, robbery, assault, and rape, was also constructed. Each study (adult) area showed a lower rate of violent crime (including rape) than their matched control (non-adult) area. In addition, the rate of child molestation was higher in the control (non-adult) areas than in the matched study (adult) areas. The results of the study offer, then, equivocal evidence at best of the relationship between crime rates and the operation of adult entertainment businesses.

D. Indianapolis, Indiana; Adult Entertainment Businesses in Indianapolis: An Analysis. (1984)

SUMMARY: From our review, this study appears to be the report most widely cited by and relied upon by municipalities as evidence of negative secondary effects. Regardless of the problems with this report as outlined in this summary, the overall study offers equivocal findings regarding the supposed relationship between adult businesses and negative secondary effects. More importantly, in a sub-area analysis most relevant to the question of the relationship between adult businesses and secondary effects, lower rather than higher crime rates were found in all study (adult business) areas when compared to control (no adult business) areas. In addition, the overall study fails to adhere to rudimentary professional standards, and an error rate cannot be calculated due to a failure to meet basic statistical assumptions. The methodological problems with this study can be summarized as follows: a) The control sites are not sufficiently comparable (properly matched) with the study sites;

b) no measurements are taken prior to the establishment of an adult entertainment business to ensure that the study is not merely picking up an already established crime pattern that is independent of the adult business(es) in the area; and c) a potential confounding effect caused by adult entertainment businesses that supplied both sexually oriented entertainment and alcoholic beverages exists in the data. Finally, the researchers did not adhere to minimum professional standards by failing to conduct a survey study of real estate professionals in accordance with proper survey techniques. Beyond being purely subjective, the most striking limitations of this survey study is that it asks a national sample of real estate appraisers who are not from Indianapolis to consider only a hypothetical scenario concerning adult businesses in a community. Thus, the survey results are not applicable to the question of whether an adult business would have a negative effect upon property values in the Indianapolis area.

The Indianapolis study contains reports of four separate analyses. Each has significant methodological problems that undercut its reliability.

1. While the first set of analyses purport to show that higher crime rates were associated with adult entertainment businesses, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas and by not including a sufficient period of time prior to the establishment of an adult entertainment business for collection and analysis of data. In this portion of the report, the researchers compared crime rates for six study areas containing at least one adult entertainment business with crime rates for six

control areas containing no adult entertainment businesses. The study authors attempted, but failed, to properly match control and study areas on a number of criteria; including zoning mix, population size, and age of housing stock. For at least two of these criteria, an adequate study/control match was not obtained. First, significant differences existed in reference to the zoning mix within the majority of study versus control sites. Second, the control sites were 37% more heavily populated than the study sites. Since population density and zoning mix may be associated with higher crime rates, any differences found between the study and control areas may be due to this density or mix rather than the presence of adult businesses.

The Indianapolis study is methodologically sound in that it did allow for a sufficient period of time after the establishment of an adult business (four years) to determine if trends for crime and neighborhood deterioration were meaningful rather than erratic patterns of social activity. However, the study did not include a sufficient period of time prior to the establishment of an adult entertainment business for the collection and analysis of data. This lack of measurement in the time before the adult business located in the area makes it impossible to determine whether findings of higher or lower crime rates in either area are associated with the operation of adult entertainment businesses, or whether the study is simply detecting an already established pattern of crime activity. In fact, the crime rates for the study areas are substantially higher at the onset of the study than that of the control areas. However, in the absence of a measure taken prior to adult businesses locating within the study area, the study cannot determine whether this difference in crime rates was a function of the presence of adult entertainment

businesses being in the area, or if the owners of the adult business chose to locate in less expensive, higher crime areas.

More importantly, a significant difference between the study and control areas in increases in criminal activity was found for only one of the four years. The researchers based their conclusion that a significant difference in the increase in average crime rate for the study versus control areas on the data from this year only. Yet, aside from a one year increase in crime rate for the study area, the differences in crime rates between the study and control areas are essentially zero. Simply put, the data collected does not support the conclusion reached that adult businesses are associated with a significant increase in criminal activity.

Finally, also problematic is the fact that at least one establishment that served alcoholic beverages was included within each of the study areas, while this was not the case for each of the control areas. As several studies (see St. Paul above) have found evidence that the presence of alcohol serving establishments are associated with higher rates of criminal activity, this must be viewed as a potentially serious flaw (confound) to the study's validity. We would expect to see higher crime rates in areas that contained establishments that served alcoholic beverages, regardless of the presence or absence of any "adult" businesses.

2. The Indianapolis report included a sub-area analysis that found lower rather than higher crime rates in all areas where adult businesses were located compared to control (non-adult) areas.

This analysis involved a comparison of crime statistics for a smaller sub-area of the larger areas considered in the first study. The researchers examined crime rates in a 1000-foot radius around the adult businesses in the study areas. They compared these crime rates to those within a 1000-foot radius around a random centroid located within the control areas used in the first analysis. This portion of the study would then appear to be the most relevant of all to the question of whether adult businesses create or cause secondary effects in the areas immediately surrounding them.

Importantly, this sub-area analysis found lower crime rates in all study (adult) areas compared to control(non-adult) areas. Thus, when examining the relation of crime to adult entertainment businesses at a more direct and specific level, the evidence in the highly cited Indianapolis study establishes that adult entertainment businesses are related to lower rather than higher overall crime rates when compared to randomly chosen control (non-adult) areas.

3. The Indianapolis report authors claimed to have found a substantially smaller increase in property values for the study areas than the control areas. However, the researchers failed to adhere to minimum professional standards by not properly matching study and control areas. This portion of the study is therefore unreliable from a scientific standpoint.

This analysis compared the average home mortgage value and average number of homes sold for the control and study areas discussed in the first study, as well as those for the center township area. Since the data came from the same study

and control areas discussed in the first analysis, it is fraught with the same methodological problems associated with that data set--the study and control areas were not properly matched. The average mortgage values in the study areas were initially 49% higher than those in either the control areas or the central township area. As such, the finding that the average mortgage value for the control areas and central township area increased by 77% and 56% respectively, while the study areas saw only an average increase of 26%, can be explained as the result of what is known as a ceiling effect. The study area values may have initially been far more inflated than the two comparison areas. Thus, it would come as no surprise that the study areas saw a smaller increase in property value than the comparison areas. The vast differences in initial mortgage values associated with the failure to properly match control and study areas rendered the two areas far too dissimilar to consider as suitable comparison groups for determining changes in mortgage values or home sale rates. Finally, it should also be noted that despite the greater increase in mortgage values for the control and center township areas in comparison to the study area, the study (adult) area still maintained a higher average mortgage value when the final measures were taken.

4. The fourth analysis reported in the Indianapolis report included the results of a national survey of real estate professionals of the American Institute of Real Estate Appraisers from around the United States. This form of data collection is flawed in three ways. First, survey research on perceived likely deterioration effects is completely subjective and does not answer the question as to whether there are secondary effects associated with adult establishments in terms

of actual property values; such as average home prices or other economic indicators. Second, even in this subjective analysis, the researchers failed to adhere to minimum professional standards by failing to conduct the study in accordance with proper survey techniques. Although a random sample of real estate professionals was obtained, the response rate was unacceptably low (only one third of the respondents returned the questionnaire). Further, no error rate was calculated for the percentages reported in the study. Without the calculation of an error rate the researchers cannot establish a "confidence interval" around the percentages calculated in the study. This is especially troublesome given the fact many of the findings hovered around the 50% mark. Without some indication of the confidence we can place in these estimates, we cannot be sure if a majority or a minority of real estate appraisers respondents projected a negative impact if adult businesses were to locate in a community.

Third, even more problematic, the appraisers were asked only to consider a brief hypothetical situation concerning a middle class family that lived in an area in which an adult bookstore would soon be opening in a nearby building. They were then asked to respond to five questions concerning the potential effects on the value of the family's home. A fatal flaw in this study is that it asks a nationally selected group of appraisers--none of whom were from indianapolis--to consider only a hypothetical scenario. Thus, it has little to say about how an Indianapolis community appraiser might actually view the value of a home in Indianapolis.

E. Summary of the six other most frequently

referenced reports.

SUMMARY: The remaining six most frequently referenced studies in descending order were reports produced by: Austin, TX (1986), St. Paul, MN (1987/1988), Amarillo, TX (1977), Detroit, MI (1972), Beaumont, TX (1982), and Kent, Washington (1982). Two of these, the reports by Beaumont, TX (1982) and Detroit, MI (1972), are not empirical studies. The Beaumont "study, " for example, is merely a report prepared by planning department of that municipality suggesting a need for regulation of adult businesses. The remaining four did not adhere to minimum professional standards of valid scientific research by failing to meet one or more of the four necessary criteria discussed in section III above.

The studies produced by Austin, TX (1986), St. Paul, MN (1987/1988), and Amarillo, TX (1977) all failed to compare neighborhood characteristics (crime rates or property values) for areas containing adult entertainment businesses with control areas containing no such businesses. In addition, studies produced by Austin, TX (1986), St. Paul, MN (1987/1988), and Amarillo, TX (1977) all failed to include measures of neighborhood characteristics over a sufficient period of time, both prior to and following the establishment of an adult entertainment business. Further, the Kent, WA (1982) study, which contained a report of an attempt to query neighbors of adult business establishments, failed to adhere to even the most minimal professional standards for proper survey research.

V. To Date, No Scientific Studies Have Specifically Examined Whether Precluding Full Nudity in "Adult

Cabarets" Ameliorates Adverse Secondary Effects.

The secondary effects studies referenced above were invariably conducted in regard to attempts to zone adult establishments in certain areas of a given municipality. In regard to the ordinance at issue here, reliance upon these studies, or even the concept of secondary effects, is scientifically insupportable for two reasons.

First, assuming that certain adult establishments do in fact engender secondary effects, we are aware of no studies that have evaluated the impact of zoning regulations on such effects. Simply put, zoning laws directed at adult businesses are enacted to reduce secondary effects. Assuming the existence of secondary effects connected to adult facilities, and assuming that zoning regulations will ameliorate the same (at least to some extent), the question must then be asked as to whether adult businesses still engender secondary effects once they are subject to zoning restrictions. We are aware of no studies which have been conducted that evaluate the level of any secondary effects that might remain in regard to adult establishments once they have been subjected to the restrictions of zoning regulations, in order to justify the enactment of further regulations of such businesses to address any argued remaining secondary effects.

Second, none of the studies that we have reviewed either analyze or even attempt to analyze whether an anti-nudity regulation is effective in reducing any secondary effects that are argued to be connected to adult businesses. In particular, with regard to the legal analysis of the constitutionality of the regulation enacted by the City of Erie, we are aware of no

studies that support the proposition that such an anti-nudity regulation is, in the context of the *Renton/O'Brien* test, necessary to further the governmental interest in ameliorating any secondary effects that may be attributed to adult businesses, or whether such a law is essential to the furtherance of that governmental interest.

CONCLUSION

In this paper we abstracted and analyzed the methodology and major empirical findings of studies purporting to detect secondary effects of adult businesses. We demonstrated, with few exceptions, the scientific validity of the most frequently used studies are seriously and often fatally methodologically flawed. These studies, relied on by communities throughout the country, do not adhere to professional standards of scientific inquiry, and nearly all fail to meet the basic assumptions necessary to calculate an error rate—a test of the reliability of findings in science. More importantly, those studies that are scientifically credible demonstrate either no negative secondary effects associated with adult businesses, or a reversal of the presumed negative effect.

Respectfully submitted,

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Interpreting Socio-legal Research.
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Communication Law.
Advanced Mass Media Effects Research.

Graduate Seminars:
Research Methods in Communication.
Applications in Research Methods.
Policy Issues in Justice and the Mass Media.

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Mass Media and Aggression Against Women.
Freedom of Communication: Mass Media and the Law.
The Effects of Mass Media.
Communication Theory.

HONORS AND AWARDS

1999 National Communication Association: Top Three Refereed Papers in Mass Communication Division. Paper Title: *Race and the Misrepresentation of Victimization on Local Television News.*

1992 International Communication Association: Top Three Refereed Papers in Communication Law and Policy. Paper Title: *Defining the limits of public tolerance for sexually explicit and sexually violent materials: A field experiment.*

1990-91 UCSB Plous Memorial Award. Presented to an Assistant professor in the College of Letters and Science "who has demonstrated outstanding performance by creative action or contribution to the intellectual life of the college community."

1990 International Communication Association. Top Ten Paper in Mass Communication. Paper Title: *Applying social science to film ratings: A shift from what is considered offensive to what is harmful to children.*

1986 Wisconsin Psychological Association Margaret Bernauer Psychology Research Award. Paper Title: *Individual differences in hostility and psychoticism, exposure to sexual violence in the media and reactions to a rape victim.*

1985 First prize: American Psychological Association Division 41 (American Psychology-Law Society, AP-LS) Dissertation Award. Title: *Sexual Violence in the Media: Effects on Male Viewers and Implications for Society*

1985 First prize: American Psychological Association Division 9 (Society for the Psychological Study of Social Issues, SPSSI) Dissertation Award.Title: *Sexual Violence in the Media: Effects on Male Viewers and Implications for Society*

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PROFESSIONAL ACTIVITIES

Research Grants (submitted)

Linz, D. *Identifying barriers to victim reports od sexual assault to the police and developing a mass media campaign to increase reporting.* Submitted to the National Institute of Justice. $196,541 (10/1/98-3/31/00).

Research Grants (funded)

Wilson, B., Linz D., & E. Donnerstein. *Evaluation of the "Choices and Consequences" Initiative*. Court TV. $120,635 (6/98-6/99).

Donnerstein, E., Wilson. B., Kunkel, D. & D. Linz. *National television violence study*. National Cable Television Association. $3,326,449 (6/94-1/98).

Malamuth, N., & Linz, D. *Predicting Sexual Coercion and Antisocial Behavior Against Women*. ($414,284, National Institute of Mental Health, 06/01/89-5/31/91).

Linz, D. *Pretrial exposure to mass media and legal decision-making*. ($41,804, National Science Foundation, 7/1/88-10/1/89).

Malamuth, N. & Linz, D. *Predicting sexual coercion and antisocial behaviors against women: An eight year follow-up*. ($2000, Small Research Grant Program, UCLA Center for the Study of Women, 1/1/88-10/1/88).

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PROFESSIONAL SERVICE

Consulting Editor

1991-93 *Journal of Research in Personality*, Academic Press.

Journal Refereeing

1989-pres. *Human Communication Research*
1988-pres. *Journal of Personality and Social Psychology*
1987--pres. *Journal of Communication*
1989-pres. *Communication Research*
1986-pres. *Journal of Research in Personality*
1988-pres. *Journal of Sex Research*
1987-pres. *Journal of Experimental Psychology*
1988-pres. *Law and Human Behavior*
1990-pres. *Journal of Broadcasting and Electronic Media*

1990-pres. *Law and Society Review*

Professional Memberships

International Communication Association (ICA)
Law and Society Association
American Psychology-Law Society (APA Division 41)
Society for the Psychological Study of Social Issues (APA Division 9)

UNIVERSITY AND PUBLIC SERVICE

Communication Department

1991-2 Graduate Advisor/ Chair-Graduate Committee
1990-4. Member Graduate Committee

Graduate Students Supervised (Directed*/Committee Member)

Ilene Arluk	M.A.*	1988		
Cynthia Felando	M.A.	1989		
Barbara Randall M.A. 1989				
Diana Stroyls	M.A.*	1990		
Audrey Weiss	M.A.	1990	Ph.D.	1994
Britt Andreata	M.A.*	1991		
Susan Fox	M.A.	1991	Ph.D.	1994
Wangner Diaz	M.A.	1991		
James Harwood	M.A.	1992	Ph.D.	1994

Jay Eskenazi	M.A.*	1992			
Dorothy Imrich	M.A.*	1992	Ph.D.*		1998
Laura Jansma	M.A.*	1992	Ph.D.	1996	
Charles Mullin	M.A.*	1992	Ph.D.*		1996
Laura Leets		M.A. 1992	Ph.D.	1995	
Denise Filotas	M.A.	1993			
Amy Tendrich	M.A.	1993			
Xixia Han	M.A.	1993			
Travis Dixon	M.A.*	1994	Ph.D.*		1998
Timothy Gray	M.A.	1996			
Sunwolf	M.A.	1997	Ph.D.	In Prog.	
Eva Blumenthal	M.A.*	In prog.			
Stacey Smith			Ph.D.	1999	
Carolyn Shepard			Ph.D.	In prog.	
Joan O'Connor			Ph.D.	In prog.	
Laura Zwarun			Ph.D.	In prog.	
Carrie Colvin	M.A.	1999			
Bryant Paul			Ph.D.*	In prog.	

Academic Senate

Member: Human Subjects Review Board, 1990-pres.

Community Service

Public Testimony/Governmental and Technical Reports

Wilson, B.J., Kunkel, D., Linz, D., Potter, W.J., Donnerstein, E., Smith, S.L., Blumenthal, E.Y., & Colvin (1997). Implications of the National Television Violence Study's content-based findings for evaluating the industry's V-chip ratings. Report to the Federal Communications Commission (CS Docket 97-55).

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Linz, D. (1991). *Obscenity law and social science measurement of community standards.* Presentation , Santa Barbara Women Lawyers, Santa Barbara, CA.

Donnerstein E. & Linz, D. (1990). *Evidence on the Causal Connection Between Exposure to Penthouse Magazine and Anti-social Conduct.* Testimony before the Indecent Publications Tribunal, Wellington, New Zealand.

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Linz, D. (1984, July). *The relationship between pornography and violence*. Testimony before the Illinois Commission on the Status of women on. Chicago.

Linz, D. (1984, February). *Civil litigation and victims of violent pornography*. Symposium on Media Violence and Pornography, Toronto, Canada.

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PERSONAL REFERENCES

Dr. Edward Donnerstein, Dean, Division of Social Sciences
Department of Communication,
University of California,
Santa Barbara, CA 93106

Dr. Neil Malamuth, Chair
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Los Angeles, CA 90026

Dr. Steven Penrod, Director
Psychology Law Program
University of Nebraska
Lincoln, NE 68588

Table 1 (cont.)
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

- St. Paul (1994)

Los Angeles, CA (1977) con't.
- St. Croix, (1993)
- Brooklyn Park, MN

4. St. Paul, MN (1978)
- Dallas (1986)
- Ramsey (1990)
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Minnesota (1989)
- Bellevue (1987)
- Brooklyn, MN
- Falcon Heights (1994)
- Brooklyn Park, MN
- Manatee County, FL
- Lynnwood (1989)
- Rochester/Olmsted (1988)

5. Austin, TX (1986)
- Dallas (1986)
- The Bronx (1995)
- Manchester, NH
- Broward County, FL
- Kansas City, MO (1998)
- Manatee County, FL
- Manhattan (1994)
- Seattle (1989)
- St. Cloud, MN
- St. Paul (1994)

6. St. Paul, MN (1987/1988)
- Brooklyn, MN
- Times Square, NY (1993)
- Minnesota (1989)
- Kansas City, MO (1998)
- Falcon Heights (1994)
- Fridley, MN
- Rochester/Olmsted (1988)
- St. Cloud, MN
- St. Paul (1994)

7. Amarillo, TX (1977)
- Dallas (1986)
- Beaumont (1982)
- Newport News (1996)
- Manatee County, FL
- New Hanover County (1989)
- St. Croix (1993)
- St. Paul (1994)

Table 1
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

1. Indianapolis, IN (1984)
- Dallas (1986)
- The Bronx (1995)
- Ramsey (1990)
- Manchester, NH
- Brooklyn, MN
- Beaumont (1982)
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Newport News (1996)
- Kansas City, MO (1998)
- Falcon Heights (1994)
- Fridley, MN
- Brooklyn Park, MN
- Manatee County, FL
- Lynnwood (1990)
- Oklahoma City (1986)
- New Hanover County (1989)
- Rochester/Olmsted (1988)
- Seattle (1989)
- St. Cloud, MN
- St. Croix (1993)
- St. Paul (1994)

2. Phoenix, AZ (1979)
- Dallas (1986)
- The Bronx (1995)
- St. Paul (1994)
- Ramsey (1990)
- Manchester, NH
- Brooklyn, MN
- St. Paul (1987/1988)
- Times Square, NY (1993)
- Newport News (1996)
- Minnesota (1989)
- Kansas City, Missouri (1998)
- Falcon Heights (1994)
- Fridley, MN
- Brooklyn Park, MN
- Manatee County, FL
- New Hanover County (1989)
- Rochester/Olmsted (1988)
- St. Cloud, MN

3. Los Angeles, CA (1977)
- Dallas (1986)
- The Bronx (1995)
- Broward County, FL
- Times Square, NY (1993)
- Newport News (1996)
- Garden Grove (1991)
- Bellevue (1987)
- Manatee County, FL
- Lynnwood (1990)
- Manhattan (1994)
- Seattle (1989)
- St. Cloud, MN

Table 2

Top Four Referenced Studies and the Criteria for Insuring Scientifically Valid Research

Criteria	(A) Well Matched Control	(B) Sufficient Measurement Time	(C) Valid Crime Measure	(D) Correct Survey Methodology	**Evidence of Secondary Effects**
Study					
Indianapolis (1984)	**invalid**	**invalid**	valid	**invalid**	**Equivocal**
Phoenix (1979)	**invalid**	**invalid**	valid	--	**Equivocal**
Los Angeles (1977)	valid	valid	valid	**invalid**	**None**
St. Paul (1978)	valid	valid	valid	--	**None**

Table 1 (cont.)
Ten Most Frequently Referenced Studies and the Municipalities That Referenced Them

8. Detroit, MI (1972)
- Beaumont (1982)
- Times Square, NY (1993)
- Bellevue (1987)
- (1989)
- Seattle (1989)
- St. Croix (1993)

Detroit, MI (1972) con't.
- New Hanover County

9. Beaumont, TX (1982)
- Dallas (1986)
- Newport News (1996)
- Manatee County, FL
- New Hanover County (1989)
- St. Croix (1993)

10. Kent, WA (1982)
- Des Moines, WA
- Bellevue (1987)
- Fife (1987)
- Lynnwood (1990)
- Seattle (1989)

FULTON COUNTY POLICE

Study Of Calls For Service To Adult Entertainment Establishments which Serve Alcoholic Beverages
January 1995 - May 1997

[Excerpts]

Prepared by: Cpt. Ron Fuller
Lt. Sue Miller
Date: June 13, 1997

RESOLUTION RELATING TO REGULATION OF ALCOHOL CONSUMPTION IN ADULT ENTERTAINMENT ESTABLISHMENTS

WHEREAS, the Board of Commissioners of Fulton County has reason to believe that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of such adult entertainment establishments; and

WHEREAS, the Board of Commissioners of Fulton County further has reason to believe that adult entertainment establishments which serve alcoholic beverages may have a negative impact on surrounding real property values; and

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities "... for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages..."; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of Goldrush II et al. v. City of Marietta et al.: Varsalona's Italian Restaurant d/b/a Bloomers et al. v City of Marietta. et al.: and Tudor d/b/a Cyprus Lounge v. City of Marietta et al. upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Georgia Supreme Court, in Chambers v. Peach County 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the

ordinance; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is consumed; and

WHEREAS, the Board of Commissioners desires that the Fulton County Police Department and the Department of Planning and Economic Development, in consultation with the County Attorney, assemble any studies available which identify and document negative secondary effects related to the serving and consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the Board of Commissioners further desires that the County Attorney prepare proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to alcoholic beverage licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which will be consistent with the above-cited March 17, 1997, ruling of the Georgia Supreme Court, and with the constitutional, statutory, and decisional law of the State of Georgia and the United States; and

WHEREAS, it is the intent of the Board of Commissioners to enact, if warranted by the said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and the consumption of alcoholic beverages at adult entertainment establishments; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression

protected by the United States or Georgia Constitutions, nor is it the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed;

NOW, THEREFORE, BE IT RESOLVED that the Fulton County Police Department is hereby directed to prepare within forty-five days hereof a study concerning calls for police assistance to, and crimes occurring at, areas wherein adult entertainment establishments which serve alcoholic beverages are located;

BE IT FURTHER RESOLVED that the Fulton County Police Department and the Planning and Economic Development Department, in consultation with the County Attorney, are hereby directed to assemble within forty-five days any studies available which document the negative secondary effects of the serving and consumption of alcohol in adult entertainment establishments;

BE IT FURTHER RESOLVED that the County Attorney is hereby directed to prepare within sixty days proposed amendments to Sections 33-1-16 through 33-1-23, Code of Fulton County, Georgia, relating to licensing of adult entertainment establishments, and to Article A, Chapter 5, Code of Fulton County, Georgia, relating to liquor licenses, and any related proposed ordinance amendments which will have the effect of prohibiting the serving or consumption of alcohol at adult entertainment establishments, and which are consistent with the March 17, 1997, opinion of the Georgia Supreme Court, and consistent with the constitutional, statutory, and decisional law of the State of Georgia and the United States;

PASSED AND ADOPTED this sixteenth day of

April, 1997.

BOARD OF
COMMISSIONERS OF
FULTON COUNTY,
GEORGIA

By:_____
Mitch J. Skandalakis, Chairman

By:_____
Commissioner Gordon L. Joyner
District 2

ATTEST:

_____
Clerk to the Board

APPROVED AS TO FORM AND LEGALITY:

_____
County Attorney

Table Of Contents

Section 1: Introduction to the study

Section 2: Overview of total number of calls and reports received by Fulton County Police

Section 3: Calls for Service: Charts & computer print outs for the following locations:
5600 Roswell Road, (Frankies)
5495 Old National Hwy. (Crowes Nest)
5840 Roswell Road, (American Pie)
5841 Roswell Road, (Good 'Ole' Days)
6300 Powers Ferry Road, (Mardi Gras)
4401 Fulton Industrial Blvd., (Riley's)
5343 Old National Hwy. (Club Legend)
304 Fulton Industrial Circle, (Babes/Fannies)
6420 Roswell Road, (Flashers)
5825 Roswell Road, (Cabo Wabo)
6071 Old National Hwy, (Club Twenty Grand)
5275 Roswell Road, (Coronet Club)

Section 4: Reports Taken: Charts & computer print outs for the locations and a sampling of reports from Adult Entertainment Establishments for 1996

Section 5: Conclusions

Brief Summary of
Goldrush II, et al. v. City of Marietta, et al. Varsalona's Italian Restaurant d/b/a Boomer's et a).. v. City of Marietta, et al., and Tudor d/b/a Cyprus Lounge v. City of Marietta, et al.

1. Amendment to Georgia Constitution provides that counties and municipalities shall have authority ".... or the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages..." [Article III, Section VI, Paragraph VII, Georgia Constitution.]

2. In January, 1995, the City of Marietta amended its adult entertainment license ordinance to prohibit the serving, selling, distributing or consumption or possession of liquor in adult entertainment establishments.

3. The prohibition ultimately was intended to extend to existing adult entertainment establishments serving alcohol.

4. The Georgia Supreme Court upheld the Marietta ordinance on March 17, 1997, and approved the Marietta ordinance's application to already existing businesses.

5. The Georgia Supreme Court, citing Chambers v. Peach County, 266 Ga. 318 (1996), reiterated that a legislative body must have appropriate studies before it documenting the

"negative secondary effects" such as crime, diminishing property values, and increased urban blight) before legislating any regulation of such negative secondary effects.

Introduction

On April 16, 1987, a Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments was passed and adopted.

This resolution directed the Fulton County Police Department to prepare a report concerning calls for police assistance and crimes occurring at, or in the vicinity of adult entertainment establishments where alcohol is sold and consumed. This was based on the reasonable belief that the consumption of alcoholic beverages in adult entertainment establishments may contribute to increased crime in the vicinity of these establishments.

The statistical information included in this study was obtained through the Fulton County Police Departments computerized incident and calls for service reporting program.

Each call for police assistance, if taken over 911 enhance, is captured by a communication assisted dispatch (CAD) system. This information is available on every address in Unincorporated Fulton County where the police department is dispatched.

Each report that is generated from a police call for service is identified with a departmental case number that is unique to that reported incident. (It should be noted that a police report is generated for every call for service, and that officer initiated calls are captured on the CAD system).

The time period covered by this study is for January 1, 1995 through May 31, 1997.

There are twelve (12) establishments included in this study. Six (6) are adult entertainment establishments that serve alcoholic beverages. The others are those establishments that serve alcoholic beverages with no adult

entertainment.

Several of the locations Frankie's, Crow's Nest, Mardi Gras, Riley's, Babes, Fannies and Club Twenty Grand have addresses that are common to other businesses on the same property For this reason, the number of police calls for service to these locations cannot be attributed solely to the specific business that serves alcoholic beverages.

Statements of Fact

The following data has been based on several known facts They are as follows:

From January 1, 1995, to May 31, 1997 the Fulton County Police Department responded to 199,324 calls for service North and 152,002 calls for service South The total calls for service being 351.326.

From January 1, 1995, to May 31, 1997 the Fulton County Police Department made 34,680 incident reports North and 29,060 incident reports South The total number of incident reports taken being 63,740.

From January 1, 1995, to May 31, 1997 there were no Murders or Kidnappings reported at any of the establishments listed in this study There were 2 Rapes, 11 Robberies and 10 Aggravated Assaults reported in the establishments that served alcoholic beverages but do not have adult entertainment There was 1 Rape, 16 Robberies and 5 Aggravated Assaults reported in the adult entertainment establishments that serve alcoholic beverages.

Conclusions

From January 1, 1995, to May 31, 1997 the Fulton County Police Department responded to 728 calls for service to incidents reported at or in the vicinity of adult entertainment establishments that serve alcoholic beverages in this study During the same time period the police department responded to 1718 calls for service to establishments in this study that serve alcoholic beverages but do not provide adult entertainment.

Conclusion: There were 990 more calls for service to the establishments that did not provide adult entertainment.

The total number of calls for service to establishments in this study totaled 2446 Of those, 259 were alcohol related by call sign only Signal 28 Public Drunkenness, Signal 29 Drunk and Disorder/Tight, Signal 30 Driving Under the Influence, and Signal 38 Illegal Alcohol/Drugs 178 of these calls were to non-adult entertainment establishments that serve alcohol 81 were to adult entertainment establishments that serve alcohol.

Conclusion: There were 97 more alcohol related calls for service to those establishments that did not provide adult entertainment.

Based on this statistical study of calls for service and reported crime at adult entertainment establishments, there is no statistical correlation that shows that there is an increase in crime at adult entertainment establishments that serve alcoholic beverages However, there is a statistical correlation that would indicate that there is greater instances of calls for service and reported crime at non-adult entertainment establishments that serve alcoholic beverages.

There is nothing in the statistics of this study that would indicate why there is such a discrepancy in the calls to service and reported crimes in these types of establishments.

LOCI OF PROSTITUTION

- "Crossing the Line?, *Dateline NBC*, June 1, 1998 – sexual harassment at a Ford Motor Company plant, including a raffle for the services of a prostitute.
- "Officer Punished for Sex with Prostitute", *St. Petersburg Times*, January 23, 1999; "Officers Disciplined for Sex with Prostitute", *Tampa Tribune*, January 22, 1999 – St. Petersburg police officers found having sex with prostitute in various places, including police cruiser, convenience store, motel and school parking lot.
- "The Best Little Whorehouse in Jersey", *Time*, August 24, 1999; "The Lure of the Art of a Suburban Bordello", *New York Times*, December 6, 1998 – upscale neighborhood home is brothel.
- "Clearwater Renews Idea of Buying Atrium", *St. Petersburg Times*, August 29, 1997 – City contemplates purchase of prostitution hangout.
- "Police Say Motels Prostitution Haven", *St. Petersburg Times*, December 25, 1997; "Police Round Up 4 Motel Managers", *Tampa Tribune*,.December 25, 1997 – four motel managers arrested and charged with renting rooms to prostitutes.
- "Prostitution Fight May Target Cars", *St. Petersburg Times*, October 14, 1998 – City Council considers car forfeiture ordinance to deter prostitution in and near residential areas.
- "Officer Accused of Visiting Brothel During Bike Patrol", *New York Times*, June 4, 1999; "NY Cops Arrested in Brothel Scandal", *New York Times*, April 27, 1999 – New York City police officers patronize brothels while on duty.

- "Police Take Steps to Squelch Prostitution", *St. Petersburg Times*, January 2, 1999 – police actions target prostitution in redevelopment area.
- "Motel Can Reopen Pending Decision of Nuisance Board", *Tampa Tribune*, February 3, 1999 – motel used by prostitutes ordered to be allowed to reopen while Nuisance Abatement Board reviews case.
- "Clearwater Prostitute Sting Nets 17 Arrests", *St. Petersburg Times*, March 19, 1997 – sting and reverse sting aimed at cleaning up prostitute stroll.
- "Aide to Lyons Accused of Soliciting Prostitute", *St. Petersburg Times*, October 10, 1997 – aide to head of National Baptist Convention (now a convicted felon), charged with soliciting prostitute.
- "Sex Ring's Client List Might Be Released", *Detroit Free Press*, December 7, 1998 – prostitution ring operating out of upscale suburban home has list of 20,000 customers.
- "Escort Service Raid Yields Sexual Predator", *Tampa Tribune*, July 9, 1999; "5 Accused of Running Prostitution Business", *St. Petersburg Times*, July 9, 1999 – prostitutes operating out of residence.
- "Internet Site Advertises Local Prostitutes", *Sarasota Herald Tribune*, July 9, 1999 – prostitutes indicate their availability at ice cream stand, gas station and entrance to (graduate) design school.
- "New Zone May Only Relocate Crime", *Sarasota Herald Tribune*, undated – exclusion area for prostitutes established.
- "Prostitution Sting Results in 21 Arrests", *St. Petersburg Times*, August 1, 1999 – Police sting operation results in arrests along prostitution stroll; away from Adult Uses.
- "Priest Facing Charge in Solicitation Sting"; *St.*

- *Petersburg Times*, August 28, 1999 – Greek Orthodox Priest arrested in prostitution stroll sting.
- "Drug Bust Nets Pinellas Politician", *St. Petersburg Times*, December 22, 1996; "Tyndall Presents Two Sides to World", *St. Petersburg Times*, January 12, 1997; "Tyndall No Stranger to Cocaine Couple Says", *St. Petersburg Times*, January 8, 1997 – member of Board of County Commissioners caught with drugs. (He was also accused of using prostitutes. Ironically, the upscale, beach front resort hotel where the arrest occurred was Jimmy Bakker's {then leader of the *Praise the Lord* ministry} trysting place.)
- "Dealers, Prostitutes Lose Favorite Corners", *Tampa Tribune*, February 12, 1999 – exclusion zones, (nowhere any of the region's Adult Uses), established to keep out convicted drug dealers and prostitutes.
- "Tampa Police Polishing Strip", *Tampa Tribune* October 27, 1996 – prostitution and drug activity target in area.
- "Official Asks Police for Report on Crime at Park", *St. Petersburg Times*, July 16, 1999 – removing law enforcement duties from park rangers leads to drug use and prostitution at park.

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August 11, 1999

Randall Tigue, Esquire
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Re: ***City of Erie v. Pap's A.M.***
Supreme Court No. 98-1161

Dear Mr. Tigue:

Please be advised that Pap's A.M. consents to your filing an Amicus Brief in this case.

Very truly yours,

AMBROSE, FRIEDMAN and WEICHLER

By: /s/ Philip B. Friedman
Philip B. Friedman, Esquire

PBF/dlb

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September 2, 1999

Mr. Gregory Karle
Attorney at Law
City Solicitor's Office
626 State Street
Room 505
Erie, PA 16501

RE: City of Erie, et al v. Pap's A.M.
Court File No. 98-1161

Dear Mr. Karle:

In previous correspondence, I have requested the consent of your office to the filing of an amicus curie brief on behalf of the First Amendment Lawyers Association. I made a similar request to Philip Friedman, attorney for respondent.

Mr. Friedman advised me that you and he had reached an agreement to consent to all amicus requests. He also copied me on a letter to you requesting your consent to FALA filing an amicus brief.

I have yet to hear from you in response, and amicus briefs in support of respondent are due on September 30, 1999. Please let me hear from you. If I do not hear from you within the next seven days, I will assume that the city objects to our requests and include a motion for leave to file instanter as part of our amicus brief.

Yours truly,

I, Gregory A. Karle, Esquire, counsel of record in the above-captioned case, have no objection to FALA filing an amicus brief to the United States Supreme Court.

Randall D.B. Tigue
Attorney at Law

By: /s/ Gregory A. Karle
Gregory A. Karle, Esq.
City Solicitor

RDBT/mh
cc: Philip Friedman

Supreme Court, U.S.
FILED
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(19)

No. 98-1161

In The

Supreme Court of the United States

THE CITY OF ERIE, PENNSYLVANIA, et al.,

Petitioners,

vs.

PAP'S A.M.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF OF AMICUS CURIAE FEMINISTS FOR FREE EXPRESSION IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS[1]

Feminists for Free Expression (FFE) is a nonprofit organization of diverse feminist women who share a commitment both to gender equality and to preserving the individual's right to read, view, and produce and enjoy media materials and performances, free from government intervention "for our own good." In support of both those goals, FFE has become active in a variety of litigation, lobbying, and educational efforts to forestall censorship initiatives in artistic venues, in the workplace and elsewhere – censorial measures which, however well-intended, are ultimately counter-productive to the goal of equality for women.

Founded in 1992, FFE quickly grew into a national organization which has filed amicus briefs in several cases before this Court, conducted legislative activities at the federal, state and local level, and defended artists from censorship both in this country and abroad. FFE's Advisory Board has included Betty Friedan, Nadine Strossen (President of the ACLU), Karen DeCrow (past President of NOW), and authors Erica Jong, Nora Ephron, Nancy Friday, Susan Issacs, Blanche Wiesen-Cook, Barbara Ehrenreich, and Dorothy Allison.

Originally organized in January 1992 in response to the then-pending Pornography Victims Compensation

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[1] The parties have consented to the filing of this brief.

No person or entity, other than the *Amicus Curiae*, its members, or its counsel have authored this brief or made a monetary contribution to the preparation and submission of this brief.

Act (S1521), FFE gained national recognition for its role in defeating that proposed legislation. More than 230 prominent women authors, activists, attorneys and scholars signed FFE's letter to the Senate Judiciary Committee protesting the bill's threatened censorial effects. The signatories included Betty Friedan, Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume. Many of the signatories were women artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has been deemed "the most censored author in America;" Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has similarly drawn fire; and Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants became the subject of protracted political and legal controversy.

Since its role in the defeat of S. 1521, FFE has undertaken numerous other projects in defense of free speech rights. FFE has filed numerous amicus briefs, including briefs with this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), *Alexander v. United States*, 509 U.S. 544 (1993), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). FFE's brief in *Harris* received a great deal of favorable attention in the press, for its position that regulations designed to curb discriminatory harassment in the workplace do not truly benefit women until they are reconciled with free speech concerns.[2]

---

[2] *See, e.g.*, Rosen, *Reasonable Women*, The New Republic (November 1, 1993) at 12-13.

FFE's concern with these issues stems from a conviction that the rights of free expression are critically important to women and to feminists, and indivisible – in the sense that they cannot be eroded in one context, such as the present campaign to censor live nude performance, and still retain their vitality in our social life generally. As many of FFE's artistic and literary members can attest, feminist expression is inherently controversial and the frequent target of censorship initiatives. Just as some would scapegoat erotic expression for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and the "decline of family values." Indeed, any written or visual work or performance which deals frankly with women's lives and sexuality is at risk in a climate of pervasive censorship.[3] Because the freedom to put forth controversial feminist ideas and to combat ignorance regarding sexuality and reproduction is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship.

---

[3] Works which have been officially or unofficially censored over the past few years include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's *1984*, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. *See* Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (1991). *See also, generally*, Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992).

FEE believes, in short, that the goal of equality is inextricably linked with the values enshrined in our Constitution's free speech clause, and progress towards gender equality can only proceed in an atmosphere of tolerance and candor with regard to matters of sexuality. In this spirit, and with the written consent of both parties to this action, FFE submits this brief in support of the Respondent.

SUMMARY OF ARGUMENT

The City of Erie's anti-nudity ordinance sweepingly proscribes even the simulated appearance of nudity, making no exception for artistic or theatrical nude performance. Moreover, when they enacted this measure, its authors announced forthrightly that they intended it solely as a vehicle for suppressing nude entertainment of the "exotic dance" variety.

In contrast with the generally applicable public indecency statute this Court upheld in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the ordinance now challenged thus unequivocally targets officially disfavored expression for censorship. Its sponsors made no pretense of "content-neutrality;" indeed they have precluded any such interpretation of the ordinance. Both this legislative history of censorial intent, and the inherent toll that a ban on nudity exacts on the content of expression, firmly establish this ordinance as a content-based restriction as applied to protected, nonobscene expression.

Further, the Pennsylvania courts have not provided any limiting construction to cure this law's substantial

overbreadth as it applies to all manner of nude performance. The city council's assurances that they intend to exempt "serious" and "tasteful" nude performance cannot save this ordinance from facial invalidation for overbreadth; on the contrary, these empty assurances merely underscore the content-discriminatory nature of this prohibition.

Consistent with decades of this Court's First Amendment jurisprudence, the challenged law must fail the strict scrutiny analysis applicable to content-based prohibitions, and must fall also as a facially overbroad restriction on protected expression. In addition, this law is viewpoint discriminatory, because it favors a religiously-based ideological viewpoint that nudity and sexuality are shameful, while effectively thwarting the viewpoint that the nude human figure should be celebrated as beautiful and natural. With even simulated nudity banned, a proponent of the latter view is limited to the sterile advocacy of a viewpoint inherently contradicted by the City's requirement of clothing.

Now a common feature of dance, theater and other live performance, nudity often conveys a distinct dramatic or social message and content which would be drastically altered by its censorship. For government to so alter the meaning and impact of artistic expression is anathema to the First Amendment.

Freedom of expression in such regards has always been and remains vital to those at the cutting edge of the worlds of art and ideas. Like universities and the press, art provides alternative perspectives on the world, often

challenging the status quo. In particular, expressive freedom is vital to advocates of radical ideas regarding sexuality, gender roles, and even politics, more strictly speaking. Feminist and other progressive ideas cannot be heard, much less thrive, in an atmosphere in which government dictates artistic choices, and defines what constitutes art, in these realms of constitutionally protected expression.

The City asks this Court to scotch its well-established First Amendment standards of strict scrutiny in this case, in favor of a "morality" exception, or uncritical assumptions of content neutrality no matter how patently censorial the law. If this Court were to do so, it would place all controversial, erotic, irreligious and radical expression in peril of official suppression.

ARGUMENT

I. Freedom to Address Themes of Sexuality and to Celebrate the Human Form is Vital to Artistic Freedom, and to Feminist Art and Polemic in Particular.

In *Roth v. United States*, 354 U.S. 476, 484 (1957), Justice Brennan for the majority noted that "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." In part for those very reasons, sex and nudity are perennial subjects of controversy: "Of all the types of speech historically deemed 'controversial' or 'offensive' in American society, speech about sex has frequently been at or near the top of the

list." Marjorie Heins, *Viewpoint Discrimination*, 24 Hastings Const. L.Q. 99, 122 (1996).

Moreover, "the political significance of sexual expression is revealed every day. Sexuality and its expression have become heated political issues in virtually every arena, from local school board disputes over sex education, to state anti-gay legislative efforts, . . . to attacks on artists who use sexual themes in their work." David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. Pa. L. Rev. 111, 122-123 (1994). And for no one is the political significance greater than for women and for feminists in particular. *See generally* Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights (1995).

Feminist art and polemic are often at the cutting edge of social issues and at the center of public controversy for their sexual content and use of nude and other sexual images. Whenever they stray beyond conventional bounds they are vulnerable to censorship, as even Andrea Dworkin learned when her works were seized at the Canadian border under the very same censorial standards she had advocated. Feminist expression, along with artistic and intellectual freedom generally, require "breathing room" and thus meaningful protection of sexual content in order to escape the censor's wrath.

History teaches that gender equality flourishes in societies such as the Scandinavian countries characterized by openness in sexual matters, and flounders in sexually repressive countries such as Saudi Arabia which are sexually repressive. *See generally* Marcia Pally, Sex and Sensibility: Relections on Forbidden Mirrors and the Will to

Censor 122-136 (1994). In the United States, campaigns against sexual expression have been strongly linked with an agenda of curtailing women's freedom generally. As Marjorie Heins and many other feminist scholars have noted, "The United States' first comprehensive federal obscenity law, the Comstock Act of 1873, targeted not only sex and nudity as subjects but also the ideas of contraception, nonprocreative sex, free love, and anarchism." Heins, *Viewpoint Discrimination*, *supra*, at 130 (1996); *see also*, Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992); Marjorie Heins, Sex, Sin, and Blasphemy: A Guide to America's Censorship Wars (1993); Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights, *supra*, at 225-228.

Women will never be truly free and equal until they are free to express ideas and emotions with regard to issues of sexuality, free of puritanical shame and guilt. Advocacy of that ideal becomes immeasurably more difficult, if not impossible, under a regime of censorship banning all nudity in expressive performances. The issue in this case is therefore one of great ideological and political importance, to women, to feminists, and to all Americans concerned to promote a culture of tolerance and intellectual and artistic freedom.

II. The Anti-Nudity Ordinance Challenged in This Case, Targeting a Particular Form of Expression, Impermissibly Censors Protected Speech on the Basis of Content and Viewpoint.

For two reasons, the City's newly enacted prohibition of nude expression must be analyzed as a content-based

restriction on speech. First, its sponsors have unabashedly announced that they intend it to suppress specific types of nude performances of which they disapprove, and indeed to "shut down" nude dancing establishments. Second, regardless of censorial intent, a prohibition of nudity inherently impinges on the content of and messages conveyed by artistic performances and entertainment which would otherwise incorporate nudity.

A. The legislative history makes abundantly clear that this ordinance targets officially disfavored expression.

It is rare that a case presents this Court with such a smoking gun of censorial intent as the City of Erie has left at the scene. As Respondent has demonstrated, the City enacted this law for the express purpose of censoring live nude entertainment of which it disapproves.

In its opinion invalidating this ordinance, the Pennsylvania Supreme Court noted, that the laws preamble candidly confesses the City's "purpose of limiting a recent increase in nude live entertainment." 719 A.2d at 279 (*see also* Jt. App. at 42a). As if this were not a clear enough statement of censorial intent, each of the City Council members who voted in favor of the ordinance announced for the record (and undoubtedly for the media and public consumption) that its primary target was nude dancing establishments. *See* Jt. App. at 38-48. Council members expressly mentioned "three clubs, . . . of which- . . . all three will be shut down." Jt. App. at 45. Indeed, Council members specified that they were *not* prohibiting

nudity in general, but rather "nudity when it is used in a lewd and immoral fashion." Jt. App. at 39.

Given this brazen legislative history, the City has clearly forfeited any pretense to the content neutrality of this law. This factor alone decisively distinguishes this case from *Barnes* and from other cases in which this Court has upheld generally applicable laws having an "incidental" impact on expression.

In *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986), Justices O'Connor and Stevens in their crucial concurrence distinguished the bona fide generally applicable public nuisance law upheld under the *O'Brien* standard from any such law used as a pretext for censorship:

> "If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having such a purveyor of books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review."

Only because the record contained no evidence of such pretextual use did Justices O'Connor and Stevens concur in the *Arcara* opinion applying the more indulgent *O'Brien* standard to uphold the bookstore closure.

In this case, the City has not even bothered with pretext but has rather openly proclaimed its censorial intent. As applied to nude performance, therefore, the ordinance cannot be analyzed under the more deferential standards for content-neutral laws. This law therefore triggers the strictest scrutiny of its facially overbroad, content-based prohibition of nudity.

B. In its sweeping prohibition of even simulated nudity, the ordinance both censors protected speech on the basis of its content, and discriminates against the viewpoint that sexuality and nudity are not shameful.

In *Barnes*, the State had at least a colorable argument that its ban on nudity was a generally applicable law. In this case, in contrast, the City of Erie has been almost at pains to proclaim its censorial intent. On this basis alone, this ordinance requires strict scrutiny as a forthright attempt to censor protected, nonobscene speech.

This Court's decisions creating an exception to First Amendment protection for obscenity were designed to protect all other controversial expression containing elements of nudity and sexuality. This Court has steadfastly reasserted that nonobscene sexual speech is protected by the First Amendment, *see, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989), and in particular that nonobscene nudity is protected. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

The faulty linchpin of the City's argument is that its total ban on nudity (extending even to simulated nudity) is only an "incidental burden" on the "manner" of speech. This premise flies in the face of our modern understanding of cognition and perception, including the fundamental insight that "the medium is the message." For government to limit "stylistic" choices in art and entertainment is in fact to censor the message, as this Court has recognized.

Some jurists including the plurality in *Barnes* have suggested that a prohibition of nudity is merely "incidental" in its effect on the content of a performance which would incorporate elements of nudity. In *Barnes*, the plurality maintained that the State's requirement that erotic dancers wear "a scant amount of clothing . . . does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic." 501 U.S. at 571. Some other courts have concluded that proscriptions of expressive nudity are permissible because "nudity does not convey any specific message; at most it is a medium by which a variety of messages may be conveyed." *Craft v. Hodel*, 683 F. Supp. 289, 292 (D. Mass. 1988).

This premise does not bear scrutiny, on either philosophical or doctrinal grounds. This Court's own First Amendment jurisprudence has recognized that style and content are indivisible, in cases prominently including *Cohen v. California*, 404 U.S. 15 (1971), and *Hess v. Indiana*, 414 U.S. 105 (1973). In *Cohen*, this Court held that government could not, as guardian of the public morality, "excise scurrilous epithet[s] from the public discourse." 404 U.S. at 22. Justice Harlan for the Court emphasized the First Amendment value that "one man's vulgarity is another's lyric. Indeed, it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

Stressing that all communication consists of indivisible cognitive and emotive elements, *id.* at 26, the *Cohen* Court essentially recognized that to censor one is to censor the other. Cohen could not be required to express his

message "slightly less graphically," to reduce his slogan to the paler statement, "I oppose the draft."

In any event, regardless of one's understanding of the relationship between style and content, such restrictions on sexual speech are not merely content-based, they are viewpoint-discriminatory as well, as feminist legal scholars have convincingly argued. *See, e.g.*, Heins, *Viewpoint Discrimination, supra* at 122-136. They discriminate in favor of the often religion-based viewpoint that sexuality and nudity are shameful, that sexuality must be confined within certain conventional, and indeed patriarchal, bounds.[4] Justice Brennan recognized this viewpoint bias in *City of Renton v. Playtime Theaters*, 475 U.S. 41, 56 n.1 (1986) (dissenting opinion), noting that restrictions on sexual speech "have a potent viewpoint-differential impact," because such speech "will almost invariably carry an implicit, if not explicit, message in favor of more relaxed sexual mores."

The City's prohibition against all nudity – at once very broadly defined and yet laden with a very specific censorial intent – provides a striking case in point with regard to viewpoint discrimination. Proscribing even simulated nudity, the ordinance utterly stifles effective expression of the viewpoint that the human form and erotic sensuality are shameless. Almost uniquely, requiring that a dancer or other performer wear some state-prescribed covering contradicts that intended message

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[4] Interestingly, as is often the case, the Council members who enacted this measure were men, whereas the performers at the three targeted clubs were women.

and viewpoint. Unlike a general prohibition against murder or drug consumption, which can be simulated for theatrical purposes, for example, the prohibition of nudity completely thwarts a message that the nude human figure is not an object of shame.

Professor Baude analyzed this problem trenchantly in his brief to this Court for petitioners in *Barnes*: "nudity has a meaning in our society quite different from the meaning of the State's sanctioned costume for erotic dancing." Patrick Baude, Brief for Petitioner Darlene Miller at 10. An anti-nudity law, he noted, has as its fundamental purpose the promotion of "a particular point of view about shame and acknowledgment of sensuality." *Id.* at 15.

> The key to the State's argument . . . is the contention that a dancer can portray an " 'erotic message' just as effectively in scanty apparel as in total nudity." . . . What cannot be conveyed just as effectively is the message that the dancer is not ashamed of what she is doing. . . . This is a powerful message and a legitimately controversial one."

Id. at 15-16. Not only does a ban on nudity suppress the message of guiltless sensuality which can really be expressed no other way; it affirmatively supports the counter-viewpoint that nudity is shameful, a morality rationale that the courts have at times explicitly linked with religious ideology. *See id.* at 13-15.[5]

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[5] Conservative scholars also perceive in the regulation of sexual speech a religious-based ideological viewpoint. *See, e.g.*, Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New – But Not So New – Approach to Obscenity*, Const. Commentary (1993), interpreting Catharine MacKinnon's "new" rationales for suppressing sexual speech as essentially grounded in religious morality.

Outside the narrow categorical exceptions this Court has carved out for unprotected speech such as obscenity, it has consistently analyzed content-based restrictions under the glare of strict scrutiny. Whether analyzed as content discrimination or as a facially overbroad restriction on protected expression, this ban on nude expression must fall under the First Amendment as this Court has interpreted it to date.

III. Unlike the Statute Upheld in *Barnes v. Glen Theatre*, This Ordinance Prohibits Nudity Regardless of Artistic Context, and Is Facially Overbroad.

In *Barnes*, Justice Souter, whose vote was essential to the judgment, specifically reserved the question of an anti-nudity prohibition challenged for facial overbreadth. 501 U.S. 585 n.2. This case squarely presents the overbreadth issue, because the Pennsylvania courts have given this ordinance no narrowing construction, and its facial terms prohibit all nudity, even simulated nudity, in expressive contexts.

As should be readily apparent, this ban on nudity applies to censor the artistic choices of a wide variety of performances including ballet and other dance, theater, and "performance art." It operates to censor innumerable performances that no one can plausibly argue are "worthless" or unprotected by the First Amendment.

The City Council members' eager assurances that the ordinance would not be applied against "serious" dance or theatrical performances, *see* Jt. App. at 84, 87-89, are neither binding on law enforcement authorities, nor any answer to a challenge on facial overbreadth grounds. Such "serious" artistic venues are sufficiently concerned that they are participating as amici in this litigation. The City Council's frank confessions of their intent merely underscore the free-wheeling discretion any such overbroad law affords law enforcement.

A ban on expressive nudity is unconstitutional as a content-based restriction with regard to *any* performance protected by the First Amendment. Its dramatic overbreadth, which could be cured by a simple exemption for nudity in the context of protected expression, is simply an additional reason it cannot survive under the First Amendment.

IV. A "Morality" Exception Would Swallow the First Amendment Whole.

Nonobscene nude expression in performances before willing audiences is unquestionably within the scope of First Amendment protection as defined by this Court's free speech decisions to date. In order to uphold the ordinance challenged here, which prohibits all such nude expression and specifically targets exotic dance establishments for censorship, this Court would necessarily create yet another categorical exception for nudity as unprotected speech, and would open the door wide for the suppression of speech on grounds of "morality."

In essence, the City asks this Court to abandon its well established First Amendment standard of strict scrutiny of content-based laws, and to ignore this law's patent overbreadth. Instead, the City would have the Court accept post hoc, pretextual justifications for such laws with a wink and a nod, to trivialize official prescriptions of style and content as "incidental," and to view considerations of "morality" as a countervailing interest sufficient to defeat free speech claims.

The recent, quietly provocative film *Pleasantville* includes a trenchant parable in this regard. The denizens of small-town Pleasantville, the setting of a 1950s-style world television sitcom, enjoy the tranquility of a life defined by predictability. Their world is shaken when color begins to invade their black-and-white world. They are outraged when the local soda-shop proprietor, who has traditionally painted holiday scenes on his glass storefront at Christmas, paints a Matisse-like nude portrait of a Pleasantville matron, in living color. Exclaiming that it is offensive and immoral, indignant citizens hurl stones and furniture, destroying the painting.

When calm returns, the mayor convenes a town meeting at which he and other civic leaders announce the new rules they have promulgated in an attempt to restore the status quo ante. Along with rules curtailing the recorded music one may play, these rules prescribe that paintings must be rendered exclusively in tones of black, white, and gray. Later prosecuted for continuing to paint in color, Pleasantville's fledgling artist pleads for official permission to paint in a limited range of colors, suggesting that perhaps the town fathers could approve the color scheme in advance.

And why not, the City of Erie would have us conclude. The image would remain the same, merely "incidentally burdened" by this regulation of the "manner" of painting, and all in the interest of public order and morality.

If this Court were to acquiesce in essence to a "morality" exception to First Amendment protection, such would be precisely the fate of avante garde artistic expression. At least in the Pleasantvilles across this country, artists and performers would soon be hat-in-hand, begging for official indulgence. The cultural landscape would be much diminished, without Mapplethorpe and Karen Finley, without controversy and without color.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression repectfully urges this Court to affirm the judgment below.

DATED: September 30, 1999

Respectfully submitted,

FEMINISTS FOR FREE EXPRESSION

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SEP 30 1999

(20)

No. 98-1161

In The

Supreme Court of the United States

CITY OF ERIE,

Petitioner,

v.

PAP'S A.M.,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Pennsylvania

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* BILL CONTE, ON BEHALF OF *THE DANTE PROJECT: INFERNO* AND THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION, IN SUPPORT OF PAP'S A.M.

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MOTION FOR LEAVE TO FILE *AMICI* BRIEF

Bill Conte, on behalf of *The Dante Project: Inferno*, and The National Campaign for Freedom of Expression seek leave of this Honorable Court to file an *amicus curiae* brief in support of Pap's A.M. The *Amici* brief in support of PAP'S A.M. is filed with permission of the Respondent. The Petitioner has not consented to the filing of the brief.

INTEREST OF *AMICI CURIAE*

Bill Conte is the Translator/Director of a theatrical production entitled *The Dante Project: Inferno*, which is based on the *Inferno* of 14th-century poet, Dante Alighieri.

Universally regarded as one of the greatest artistic achievements of the millennium, Dante's *Inferno* has been an inexhaustible source of inspiration for artists working in every field, especially in sculpture and painting. In translating the work faithfully from its original poetic source to these other media, painters and sculptors traditionally and invariably depict the damned as being naked. This is based on the graphic descriptions in the poem. To emphasize the brutishness, vulnerability, and humiliation of the damned souls in hell, Dante pointedly refers to their being completely exposed to the elements, the torment of demons, and the scrutiny of himself and Virgil, his guide.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production,

tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as proscribed by Erie Ordinance No. 75-1994.

If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

The National Campaign for Freedom of Expression is an educational and advocacy network of artists, arts organizations, audience members and concerned citizens formed to protect and extend freedom of artistic expression and fight censorship throughout the United States. The Campaign's work reflects the understanding that true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First

Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions.

CONCLUSION

Amici respectfully request this Honorable Court to grant them leave to file this *amicus curiae* brief in support of Pap's A.M.

Respectfully submitted,

Jack R. Burns, WSBA #01590
Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici* discloses that he authored this brief with the assistance of Judith Lynne Hanna, Ph.D. Dr. Hanna is a cultural anthropologist; Senior Research Scholar, Department of Dance, University of Maryland; and educator. She has authored five substantial books on dance and over eighty-seven (87) articles on dance in peer reviewed scholarly journals. Funding for the preparation and submission of this brief was provided by Consolidated Bookkeeping & Management Services, Inc., Seattle, Washington.

[2] Amicus Conte is a freelance actor, director, playwright and lecturer in the Department of English, Speech and World Literature at the College of Staten Island (CUNY) and in the Department of Humanities at St. John's University.

The Dante Project: Inferno plans to open off-Broadway in New York City in the fall of 2000. There will be eight performances per week, with matinees on Wednesdays and Sundays and, with the success of the production, tours nationally and internationally. *Amicus* Conte intends to present *The Dante Project: Inferno*, to the widest possible audience in a manner that makes Dante's words spring to life. The outcome of this case will have an impact on the production.

As with every other image and theatrical effect in the production, the source is Dante himself. As described in the poem, the damned souls are in constant motion. This movement must be choreographed in accordance with the poetic descriptions of Dante. Under any construction, the actors will be "[appearing] in a state of nudity," as proscribed by Erie Ordinance No. 75-1994. If the "damned" are not allowed to appear "naked," the audience will be deprived of an integral component of Dante's vision. Bereft of this expressive element, shorn of any hint of eroticism, the production will fail to capture the depth and complexity of Dante's thoughts, thereby doing disservice both to the Poet, as well as the theater-going public in New York, which expect no less than thought-for-thought fidelity in any work of art purporting to be a legitimate theatrical translation of Dante's *Inferno*.

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true democracy is dependent on the right to free expression for all. The National Campaign for Freedom of Expression is the only nationwide organization exclusively dedicated to challenging the erosion of First Amendment rights as applied to the support, presentation and creation of the arts in our culture today.

Nudity has been an appreciated and legitimized subject of artistic expression for thousands of years. All of the classical civilizations represented naked male and female bodies in their art works. From the great ancient art of Asia, Africa and South America through the classical works of the European masters to contemporary North American and other global artists, nudity has been a constant. The law governing artistic expression acknowledges the important and historical role of nudity.

If the Erie Ordinance is upheld, it will create precedent for similar legislation throughout the country that will result in the censorship of serious artistic theatrical productions. Amici urge this Court to affirm the decision of the Pennsylvania Supreme Court. Any other decision will vest government officials with the unfettered power to censor non-obscene productions containing nudity, no matter how important that nudity is to the messages of the production.

SUMMARY OF ARGUMENT

Nudity has a long history in the performing arts in this country. Early concerns focused on exposure of the ankle, loose fitting clothing, the length of skirts and exposure of the female leg. With the coming of the 20th

century, full nudity began to be used in mainstream theater dance. In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. In addition, moving nude dancers appeared in Florenz Ziegfeld's popular revues in New York City. Topless dancers were on the scene by 1945.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements. As an art form, dance requires learned skill, imagination, and communication. "Exotic dance," the expressive conduct targeted by Ordinance No. 75-1994, is a form of dance and a form of art with its own style and aesthetic.

An exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings. The predominant characteristic distinguishing exotic dance from other forms of dance is the use of nudity to deliver the messages of the dance.

Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance. Without nudity, the messages of the dance are substantially changed. The research reveals that men judge a nude dancer to be communicating a different message than a clothed dancer.

The "overbreadth doctrine" prohibits a statute from making innocent or constitutionally protected conduct criminal. The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.

Section 1(c) of Ordinance No. 75-1994 prohibits any nudity in the performing arts, including exotic dance. In addition, it prohibits certain costumes intended to convey representational messages. Because the Erie ordinance prohibits nudity, and the representation of nudity, in all live performances, including those with serious literary, artistic, or political value, it is unconstitutionally overbroad.

The overbreadth of the regulation here is both real and substantial. Erie's ban on nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. The potential impermissible applications of Section 1(c) dwarf whatever the legitimate reach of the regulation may be.

Because the State courts have refused to render a narrowing construction, and it is not within the power of this Court to do so, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.

ARGUMENT

1. Nudity, A Medium For Communicating Various Messages, Has A Long History In The Performing Arts.

"Nudity" has a long history in the performing arts in this country, both as to its use and its meaning.

In the 1820's, public debates over nudity focused on the length of ballet dancers' costumes. At that time, a leg was called a limb, and it was covered, even for sunbathing and swimming.

In 1827 citizens railed against the French ballet dancer, Madame Francisque Hutin, for the "public exposure of a naked female."[3] She wore a long silk skirt covering loose trousers fastened at the ankle. A glimpse of a loose trouser-clad thigh when the dancer pirouetted and her skirt flew up was equated with total nudity – yet not an inch of skin beneath the waist showed.[4]

It was not until the 1840's that the social status of ballet dancers was elevated. Ballet dancers' skirt lengths had been shortening, but coming from France, dancer Fanny Elssler anticipated American conservatism and lengthened her costume by a full foot. Her successful debut in the U.S. marked the acceptance by upper-class audiences of ballet as "art."[5] This helped expand the boundaries for the use of the partially-revealed female

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[3] Robert Clyde Allen, *Horrible Prettiness: Burlesque and American Culture*. Chapel Hill: University of North Carolina, 1991, pp. 88-89.

[4] *Id.*

[5] *Id.*, 90-91.

form in the performing arts and provided a rationalization for pleasure in viewing ballet.

The 1865 stage spectacle, "The Black Crook," popularized ballet. It had a large number of female legs, that is, "undressed" dancers with close-fitting pantaloons stopping at mid thigh, sleeveless bodices and short skirts, all considered "nudities."[6]

The 1893 Chicago World's Columbian Exposition revealed even more female anatomy. "Streets of Cairo" and Algerian and Persian village exhibits featured, for the first time in public, the dance called *danse du ventre*, cootch, hootchy-kootchy, and "belly dance" – a forerunner of contemporary exotic dance. While American women wore corsets under long dresses, the performers wore baggy trousers and midriff-length tops over an uncorsetted body.[7]

Full nudity first appeared in the 1840's theatrical *tableaux vivants*. Performers posed as "classical nudes" on revolving turntable stages that allowed "more revealing" views.[8] The "living statues" slightly changed positions.

Moving nude dancers in popular art appeared from 1912-1929 in Florenz Ziegfeld's revues in New York City.

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[6] *Id.*, 108-111.

[7] *Id.*, 225-226.

[8] Timothy Gilfoyle, *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920*. New York: W.W. Norton & Co., 1992, p. 127.

Flirting with naughtiness, many of the revues presented feminine nudity veiled.[9]

While unembellished nudity was still taboo during the early part of this century, dancers used gimmicks to give the illusion of nudity, such as a g-string with glued pubic hair, or they delivered quick intimate glimpses of body parts in flashes. For example, in the 1930s, Sally Rand covered and fleetingly exposed her nudity with two huge ostrich fans.[10]

Topless dancers were on the scene by 1945. Famous strippers included Lili St. Cry, Blaze Starr, Tempest Storm, and Gypsy Rose Lee.[11]

The 20th century saw the fully nude body used in mainstream theatrical dance.[12] In the first three decades of the 20th century, the famous American modern dancer Isadora Duncan established nudity, or near-nudity, as important to her art. "Modern dance" rebelled against the unnaturalness of ballet with its specific codified positions, movements and fitted costumes. Compressing internal organs, women's tightly corseted bodies of the

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[9] Allen, supra, 246; *see also*, Lucinda Jarrett, *Stripping in Time: A History of Erotic Dancing*. London: Pandora, 1997, pp. 108-110.

[10] Ann Corio, *This was Burlesque*. New York: Grossett & Dunlap, 1968, p. 98; Jarrett, supra, p. 150.

[11] Allen, supra; Jarrett, supra.

[12] Judith Lynne Hanna, *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire*. Chicago: University of Chicago Press, 1988.

19th century were seen as chastisement, pain, and symbolic of oppression.[13]

More recent landmarks in mainstream theater provide a context for nudity in dance today. Yvonne Rainer's "Trio A," performed in 1966 in New York City, showed nude dancers with American flags hanging from their necks in protest against repression and censorship. In Anna Halprin's New York City debut of "Parades and Changes," in April, 1967, modern dancers disrobed. "Hair," a rock musical that opened October 29, 1967, brought nudity, including a glance at pubic hair, to a New York City Broadway theater. The 1969 musical "Oh! Calcutta!" showed female and male frontal nudity and group body contact. The 1970 classical ballet "Mutations," by Glen Tetley and Hans van Manen, showed a nude man dance a slow celebratory solo and a nude couple perform an entwining duet while three nude henchmen moved about. American choreographer Mark Morris presented "Striptease," with its "down to the buff" commentary on hypocrisy in society. Bill T. Jones's modern dance "Last Supper at Uncle Tom's Cabin/The Promised Land," first performed in 1990, featured nudity among an assemblage of up to 50 company and community members – tall and short, fat and thin, black and white, old and young – all devoid of disguise, vulnerable, and unashamed, pulling together against the disparate strains of conflict over race, sexual orientation, gender, poverty and age. The nudity of the all-male modern Creach/Koester Dance Company in its 1998 "Study for a Resurrection," in St. Mark's Church, in New York City, "affirmed the body's

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[13] *Id.*

beauty and vulnerability."[14] "Naked Boys Singing," a 1999 musical review presented at the Actor's Playhouse in Greenwich Village, New York City, poked fun at social behavior.

Contemporary exotic dance is an outgrowth of these important 20th century developments in theater.

2. What Is Exotic Dance?

Dance is purposeful, rhythmical and culturally influenced sequences of nonverbal body movements.[15] As an art form, dance requires learned skill, imagination and communication.[16] "Exotic dance," also called nude, seminude, erotic, striptease or barroom dance, is dance and a performing art with its own style and aesthetic.[17] The roots of contemporary exotic dance are in traditions of middle east dance and burlesque.

In contemporary exotic dance, a dancer initially appears clothed, signifying the social norm. Transgressing this norm, she commonly strips to nudity in the course of her performance.

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[14] Jack Anderson, "Reverently Naked for Rites in Church," *New York Times*, October 7, 1997, p. B3.

[15] Judith Lynne Hanna, *To Dance Is Human: A Theory of Nonverbal Communication*. Chicago: University of Chicago Press, 1987.

[16] *Webster's Ninth New Collegiate Dictionary*, Springfield, MA: Merriam-Webster Inc., 1987, p. 105.

[17] The term "exotic dance" comes from the 1893 Chicago World's Columbian Exposition which featured the "exotic," meaning "the unusual other."

As an actor, an exotic dancer attempts to communicate to patrons through the senses of body movement, proximity and verbalization, an illusion of intimacy, spontaneity and emotion. By creating an illusion of concern and availability for a patron, the exotic dancer seeks, theatrically, to effect a transformation in the patron's feelings.[18]

Notions of artistic merit in exotic dance center on theatricality; i.e., the performer's sensuality, costume and physical disclosure, beauty, personality, friendliness, musicality, creativity, and variety and quality of movement repertoire. Evaluation of a performance is also based on how well it fulfills its communicative purpose.[19]

Exotic dance is usually performed in cabarets generally referred to by municipalities as "adult cabarets." These cabarets have all the indicia of a dinner theater. Similar to dinner theaters, "adult cabarets" have entrance fees, a raised stage on which entertainers perform, table seating surrounding the stage, special lighting and sound

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[18] Judith Lynne Hanna, "Undressing the First Amendment and Corsetting the Striptease Dancer," *The Drama Review* 42, 2(T158):38-69, Summer 1998; Judith Lynne Hanna, "Toying with the Striptease Dancer and the First Amendment," Stuart Reifel, ed. *Play & Culture Studies*, Vol. 2: *Play Contexts Revisited*, Stamford, CT: Ablex Publishing Corporation, 1999, pp. 37-56.

[19] The claim that dance performed in exotic dance clubs is not dance as performed at mainstream theaters is a difference of degree or quality, not a difference of kind. While today, ballet, with its many years of demanding training, may be deemed "high art" by mainstream dance critics, in the 19th century, ballet was commonly considered a disreputable low art. Hanna, "Undressing . . . ," 1998, supra, pp. 48-50.

systems, a separate dressing area and "ushers" to seat the members of the audience and maintain proper decorum. Some "adult cabarets" serve food and drink and have reserved seating areas for patrons paying a premium.

3. Without Nudity, The Intended Messages Of Exotic Dance Are Substantially Changed.

Recognizing that nudity is a key component of exotic dance, it is important to explore the value of nudity as part of the communicative messages of the dance.

In the context of theatrical productions, ballet and modern dance, nudity is used for many different expressive purposes. While, "it is impossible to reduce to a single organizing factor the multitude of associations the naked human body stirs . . . ," "nakedness is a time honored way of showing the body's grace and beauty . . . "[20]

Further, nudity, as an integral and expressive component of dance, may incorporate some or all of the following messages: – natural beauty, eroticism, sensuality, sexuality, fantasy, pretense of sexual availability, emotional and physical intimacy, unbounded and uncomplicated continuous desire, acceptance, tenderness, the jewel of femininity or masculinity, longing, and harmony of sex and gender.[21]

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[20] Richard Schechner, *Environmental Theater*. New York: Applause, 1994, pp. 89-90.

[21] For example, see Rebecca Schneider, *The Explicit Body in Performance*. New York: Routledge, 1997; Francis Sparshott, *A Measured Pace: Toward a Philosophical Understanding of the Arts of*

Additionally, the nude body may be seen as a "portable art gallery constantly on display, subject not only to . . . [one's] own reactions but also to those of others."[22]

Nudity in theater can bear on the historical tension between how the body was revealed in the past and how it is revealed now or how it challenges the status quo.[23] Nudity may also serve as a vehicle to challenge and mock some religious and moral tenets.

Nudity is often used to express something other than eroticism. If the message intended to be conveyed by the use of nudity is the naturalness or beauty of the naked human form, such a message is defeated by covering the body in such a way as to suggest that nudity is not natural or beautiful. If the message signifies defenselessness, vulnerability, or Eden-like innocence, "only complete nudity could make the point; the retention of even a loin cloth would not weaken the effect, but change it into something quite different."[24]

Nudity in exotic dance has a special meaning. Exotic dance reflects the culture of its time and by definition must be "naughty" and go beyond what is seen in public

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Dance. Toronto: University of Toronto Press, 1995; Karl Toepfer, "Nudity and Textuality in Postmodern Performance." *Performing Arts Journal*. No. 54:76-91, September 1, 1996.

[22] Mary Ellen Roach and Joanne Bubloz, eds. *Dress, Adornment, and the Social Order*. New York: Wiley, 1965. p. 13.

[23] Hanna, "Undressing . . . ," 1998, supra; Meiling Chen, "Les Demoiselles d/L.A.: Sacred Naked Nature Girls' Untitled Flesh," *The Drama Review* 42, 2(T158):70-97, Summer 1998.

[24] Francis Sparshott, *"Some Aspects of Nudity in Theater Dance."* Dance Chronicle 18(2), p. 307.

places.[25] The exotic dancer's creation of erotic fantasy through her moving body draws upon nudity as a natural element of theatrical artistry. Nudity theatrically speaks, like an emblem, uniform, or other symbol and emotion.

Given the fact that nudity is regularly used in the performing arts to communicate a particular message, a central question in the evaluation of any regulation banning performance nudity is whether the message conveyed by the nudity, i.e., the content of the performance, is substantially altered. Put another way, does it makes a difference to the patron in the sending and receiving of erotic messages, for example, if a performer or exotic dancer is clothed or nude? Recent research demonstrates that nudity significantly enhances the intended messages of exotic dance.

Psychologist Edward I. Donnerstein's study of exotic dance[26] disproves the conclusion in *Barnes v. Glen Theatre, Inc.* that "the requirement that the dancers don pasties and a g-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic."[27] The research demonstrates that nudity, as a component of exotic dance, is essential to the

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[25] Hanna, "Undressing . . . ," 1998, supra; Hanna, "Toying . . . ," 1999 supra.

[26] A 1996 declaration by Dr. Donnerstein describes his research methodology and conclusions. A copy of that declaration is included in the appendix to this brief along with the study report. In addition, it can be found in the records of this court in the Appendix to the Petition for Writ of Certiorari filed by Deja Vu of Nashville, Inc. in Case No. 98-1935.

[27] 501 U.S. 560, 571 (1991).

messages conveyed by such dance. Without it, the intended messages are substantially changed.

The study reveals that men judge nude dancers to be communicating different messages than clothed dancers. Ultimately, the study concludes that a dancer donning pasties and a G-string conveys a significantly different message compared to when she is nude.

4. Because The City of Erie Ordinance Bans All Expressive Nudity, It Is Unconstitutionally Overbroad.

Given the historical perspective of nudity in the performing arts set out above, this Court is asked to review a regulation that bans all performance nudity. The scope of expressive conduct regulated by section 1(c) of Ordinance No. 75-1994 goes far beyond the type of dance thought to produce adverse secondary effects; it prohibits nudity in mainstream artistic productions as well. Because the regulation sweeps too broadly, it must be found unconstitutional.

A. The Ordinance.

The challenge in this case is directed at Section 1(c) of Ordinance 75-1994. Section 1 provides:

> 1. A person who knowingly or intentionally *in a public place*:—
>
> a. engages in sexual intercourse;
>
> b. engages in deviate sexual intercourse as defined by the Pennsylvania Crimes Code;

c. *appears in a state of nudity*, or

d. fondles the genitals of himself, herself or another person commits Public Indecency, a Summary Offense. (Emphasis added)

"Nudity" and "public place" are separately defined. In addition to its ordinary meaning, nudity is defined in Section 2 to include:

> . . . the exposure of any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perieueum anal region or pubic hair region; or the exposure of any device worn as cover over the nipples and/or areola of the female breast, which device simulates and give the realistic appearance of nipples and/or areola.

Section 4 defines the term "Public Place" to include all buildings owned by or open to the general public, specifically including *places of entertainment* and *theaters*. (Emphasis added)

On its face, the regulation prohibits any nudity in the performing arts. In addition, it prohibits certain costumes intended to convey a representational message[28] and it

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[28] Under any interpretation of the ordinance, a performer wearing a black body stocking that has material attached to it to realistically simulate the nipple and areola would be "appearing in a state of nudity" and, thus, guilty of a summary offense. Even if a simulation is not realistic, a performer is guilty of a summary offense if their costume gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region. Justice Souter concurred in the judgment in *Barnes*, in part, because nothing short of the

prohibits entertainers from touching themselves in the genital area, even if fully clothed.[29] Because of the excessive sweep of the regulation, it is unconstitutionally overbroad.

B. The Overbreadth Doctrine.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1963). The "overbreadth doctrine" prohibits a statute from making innocent or constitutionally protected conduct criminal. *Id.* at 613; *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct. The loss or substantial impairment of precious

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obscenity laws prohibited a dancer "from expressing an erotic message by articulate speech or representational means." 501 U.S. at 587. Here, even the attempt to represent the state of nudity is prohibited.

[29] While Section 1(d) was not challenged below, it clearly regulates expressive conduct protected by the First Amendment that does not involve nudity. For example, this section would prohibit Michael Jackson's performance in "Thriller," where he grabs his crotch or the routines of many comedians mimicking the antics of professional baseball players adjusting themselves.

First Amendment rights may be critical, since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Under the overbreadth doctrine, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.' " *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

While the overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613, a plaintiff may prevail on a facial attack by demonstrating that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . " *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

In the First Amendment context, criminal statutes, such as the one here, must be scrutinized with particular care. "[T]hose that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

C. Application Of The Overbreadth Doctrine

The Erie ordinance prohibits nudity in all live performances, including those with "serious" literary, artistic, or political value. The ordinance contains no limiting provisions and makes no attempt to regulate only those expressive activities that are alleged to cause purportedly harmful secondary effects.[30]

The threshold inquiry for purposes of First Amendment analysis is whether the purpose of the Ordinance is to suppress communication. The preambles to the ordinance plainly state that it was adopted

> for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

The stated purpose of the ordinance focuses on the negative secondary effects of "nude live entertainment," not the evils, in general, of nudity in the performing arts or

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[30] There is absolutely no evidence in this record linking expressive nudity of the kind portrayed in performances of "Hair," "Bent" and "Equus" with the purported harmful secondary effects of "providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases, and other deleterious effects" targeted by the regulation.

nudity in public places.[31] The ordinance states no moral or practical objection to nudity in and of itself.

Given this explicitly stated purpose, Ordinance No. 75-1994 is not a law of general applicability that only indirectly affects speech. *See, Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991), Scalia, J. concurring. The perceived evil that Erie seeks to address is live adult entertainment. The ordinance specifically targets live nude entertainment because of the perceived "secondary effects" associated with that type of expressive conduct.[32]

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[31] While there is a general "moral disapproval of people appearing in the nude among strangers in public places", this societal disapproval does not apply when the nudity is part of an artistic representation or presentation. As stated by Chief Judge Richard Posner, "the nudity of a flasher and the nudity of an artistic performer are not the same thing . . . the difference, which is independent of the quality of the artistic performance, is [John Stuart] Mill's difference between self-regarding and other-regarding conduct. The flasher thrusts his nudity on an unwilling stranger; the artistic performer sells nudity to willing customers." Posner, Richard A., *Sex and Reason*, pp. 379-380 (Harvard University Press, 1992).

[32] Were the regulation targeted at the persuasive effect of the speech, as seems likely here, it would surely be unconstitutional. In *Boos v. Berry*, 485 U.S. 312, 321 (1988), the court said:

> Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in Renton. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.

Insofar as the ordinance attempts to prohibit, in any kind of performance, costuming that simulates nudity, it is not nudity that is prohibited; rather, it is the idea and representation of nudity that is suppressed. This prohibition is clearly content-based.

Because the purpose of the regulation is to suppress expressive conduct in order to ameliorate the alleged secondary effects caused by live nude entertainment, the regulation must survive an enhanced level of scrutiny which requires the Court to determine whether there is a substantial justification for the proscription. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 578-79 (1991), Scalia, J., concurring.

The Pennsylvania Supreme Court describes the entertainment offered by Pap's A.M. as "nude erotic dancing," 674 A.2d 338, 340 (1996) and as "the same exact variety as the restricted entertainment in *Barnes*." *Id.*, at 344. Presumably, the City intended to include only the kind of live nude entertainment described in *Barnes* since the preambles to the ordinance reflect that it relied upon *Barnes* in passing the ordinance.

Whatever the intent, the sweep of the regulation here goes far beyond the kind of dance described in *Barnes*. The regulation reaches all performance nudity, including that which has not been shown to cause adverse secondary effects. Neither the ordinance itself nor the state

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> The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

courts have limited the application of the ordinance so that it does not apply to the performing arts.

The City of Erie bears the burden of demonstrating a substantial governmental interest justifying the ban on theatrical nudity. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51 (1986). There is no evidence in the record here that nudity in productions performed in mainstream theatres can be causally connected to the presumed evils targeted by Erie, whether by mere correlation or by the persuasive effect of the nudity. *See, Barnes*, 501 U.S. at 585-86, Souter, J., concurring. Absent such evidence, the regulation impermissibly burdens a substantial amount of protected speech.

Throughout this litigation, Pap's A.M. has challenged Section 1(c) of ordinance No. 75-1994 as being unconstitutionally overbroad.[33] Had a similar challenge been raised in *Barnes*, it is clear that five (5) members of the Court would have found the statute there unconstitutional. Justice Souter, noting that there was no overbreadth challenge before the court, indicated that the secondary effects rationale on which he relied would be open to question if the statute could be used to bar expressive nudity in classes of productions that could not readily be analogized to the adult films at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

> It is difficult to see, for example, how the enforcement of Indiana's statute against nudity in a production of "Hair" or "Equus" somewhere other than an "adult" theater would further the State's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

[33] Pet. App. A at 3a.

Barnes, 501 U.S. at 585 n. 2. The productions Justice Souter would have been loathe to prohibit in *Barnes* fall squarely within the prohibitions of Section 1(c) of Ordinance No. 75-1994.

While a statute is overbroad if it sweeps constitutionally protected expression within its prohibitions, the Court has indicated that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982). *Amici* respectfully submit that the overbreadth of the regulation here is not hypothetical; rather, it is both real and substantial.

Erie's ban on performance nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes; i.e., nudity used as a communicative medium in operas, ballet, plays, musicals and other serious artistic performances. Here, the potential impermissible applications of Section 1(c) dwarf the assertedly legitimate reach of the regulation.

In addition to banning nudity, the regulation prohibits costumes that simulate specified anatomical parts of the human body. Whatever evidence may exist to

demonstrate a correlation between live nude entertainment and adverse secondary effects does not support the conclusion that there is a link between artistic productions which have no nudity, but use costumes that simulate the nude condition, and secondary effects.

From its analysis, it is abundantly clear that the Pennsylvania Supreme Court, like the trial court, found the regulation at issue unconstitutionally overbroad because it reached far more speech than was essential to accomplish the expressed governmental interest in eliminating alleged secondary effects associated with live nude entertainment. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (the incidental restriction on alleged First Amendment freedoms can be no greater than is "essential"). Consequently, the court severed the portion of the ordinance that brought the performing arts within its regulatory sweep. In doing so, the Court refused to rewrite the ordinance to permit nudity in performances other than "live nude entertainment."[34]

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[34] Throughout this litigation the City has asked the courts to rewrite the ordinance in order to remove its unconstitutional overbreadth. Failing this, the City argues that, in the exercise of its prosecutorial discretion, it would never prosecute mainstream theatrical productions. Joint Appendix 88-89. The City essentially asks this Court to rely on its good judgment that it will not enforce the ordinance against nude entertainment that might appear in the context of a theatrical performance or "serious" dance. The mere existence of discretion is the evil that the overbreadth doctrine seeks to cure. *Forsyth County, GA v. Nationalist Movement*, 505 U.S. 123 (1992); *see also, City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769 (1988) (the face of the ordinance contained no explicit limits on the mayor's discretion). In *Forsyth County*, the Court stated:

> . . . the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so. 505 U.S. at 133, n.10.

Because the Erie ordinance reaches a substantial amount of protected expression and the State courts have refused to render a narrowing construction, it is unconstitutionally overbroad.

CONCLUSION

Section 1(c) of Ordinance No. 75-1994 prohibits nudity in the performing arts, thus effecting the messages and content of "serious" artistic presentations. Because the regulation is targeted at expressive nudity and sweeps a substantial amount of protected expression within its prohibitions, its overbreadth is both real and substantial. As a consequence, the decision of the Pennsylvania Supreme Court should be **AFFIRMED**.

Respectfully submitted,

JACK R. BURNS, WSBA #01590
Counsel for *Amici*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:

STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	**MDL DOCKET NO. 1031** **ALL CASES** **JUDGE ROBERT L. ECHOLS**

AFFIDAVIT OF DR. EDWARD I. DONNERSTEIN

Dr. Edward I. Donnerstein, under penalty of perjury under the laws of the States of Tennessee and California, declares as follows:

1. I am a Professor of Communication and Psychology at the University of California, Santa Barbara, and am currently Chairperson of the Department of Communication. I was Chairperson of that Department from 1986 to 1991, Vice Chairperson from 1991 until 1994, and once again returned as Chairperson this year.

2. I teach in the areas of the psychological effects of media, mass media policy, policy implications of social science research, and research design, methods and statistics. I have taught these subjects, and particularly the area of research design, since 1972, and my teaching experience has been in Illinois, Iowa, Wisconsin, Canada, Beijing, China, and in California.

3. Although my research and teaching is devoted to a wide variety of areas, I have developed over the years the areas of specialization concerning the study of sexual and/or erotic expression and the effects of such on human behavior, and the effects of violent forms of communication on individuals. My areas of concentration often concern the intersection between psychological theory and research and the law.

4. My expertise in the area of sexual and/or erotic expression has resulted in me serving as a member on the United States Surgeon General's Workshop on Pornography, chaired by then Surgeon General C. Everett Koop during the Reagan administration, and as the lead social science witness to the United States Attorney General's Commission on Pornography chaired by Attorney General Edwin Meese, also during the Reagan administration, which has generally been referred to as the "Meese Commission".

5. I regularly obtain grants for the conducting of studies that I have designed, and many of these grants have been provided through various governmental agencies and organizations, including the United States Army, the National Institute of Health, the National Institute of Mental Health, and the National Science Foundation. In 1994, I, along with a number of my colleagues, was awarded a grant in excess of Three Million Dollars by the National Cable Television Association to conduct research from 1994 until 1998 with regard to the content of depictions of violence on television; this grant being part of a governmental and industry desire to assess the levels of violence on television so as to inform legislators, parents

and the industry on as to solutions regarding media violence.

6. As indicated in my current Curriculum Vitae (hereinafter "C.V."), a copy of which is attached hereto and incorporated herein by reference, I have published regularly and frequently over 125 articles in my areas of specialization. In addition, I have testified frequently as an expert witness in court and before legislative bodies, both domestic and foreign, regarding human sexuality, pornography, violence, the media, and the effects of erotic expression on human perceptions and behavior. This testimony is set forth, in detail, on pages 27-28 on my C.V., and includes testimony before the Canadian Commission on Pornography and Prostitution, various committees of the Parliament of Australia, the New Zealand Indecent Publications Tribunal, the United States Senate Judiciary Committee, and the Federal Communications Commission. I have been qualified as an expert witness in the areas of erotic expression and its effect on human perceptions and behavior in numerous courts in the United States and Canada, including but not limited to testimony in the United States District Court for the Western District of Tennessee, in the case of *United States of America v. Ellwest Stereo Theatres of Memphis, Inc., et al.*, Case Nos. 89-20254-G, 89-20255-G, and 89-20256-G, before the Honorable Julia S. Gibbons. Most recently, I testified before the United States Senate Commerce, Science and Transportation Committee on July 12, 1995 and presented testimony on the effects of mass media violence. This testimony was offered in connection with the research grant and study we are conducting concerning

television violence and development of the so-called "v-chip".

7. I regularly and on an ongoing basis, design and conduct research studies regarding the effects of mass media, the effects of certain forms of expression upon individuals and groups of people, and matters concerning the interrelationship between the mass media and social policy.

8. In June 1995, I was contacted by Bradley J. Shafer and asked to design and to conduct a study concerning the expressive message being conveyed in erotic performance dance, in order to determine what impact, if any, there was on this message by the presence or absence of nudity during such performances. In particular, we were asked to test the accuracy of the statement in *Barnes v. Indiana*, 501 U.S. 560, 571, 115 L.Ed.2d 504, __ S. Ct. ___ (1991), that "the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic". Basically, we were asked to design and carry out a study to determine if a nudity component of certain erotic performance dance was part of the content of the message being communicated by and through such dance, as opposed to being merely the manner in which such dance was displayed, and if so, what impact, if any, on such a message there would be by precluding nudity in such dance performances.

9. With these goals in mind, my associate, Dan Linz, and I visited an erotic dance establishment, Little Darlings, in Las Vegas, Nevada, in order to familiarize ourselves with the type of dancing involved, the manner in

which it was normally performed, and to develop a conceptual format for conducting a study. Little Darlings is run by the "Deja Vu" organization, and, from what I have been told, provides the same type of performance dance entertainment as exists in other "Deja Vu" clubs around the country, including that in Nashville, Tennessee. As a result of this visit, consultations with Beth LePoire, a professor in our department who specializes in non-verbal communication, and consultations with Judith Lynne Hanna, a cultural anthropologist who specializes in the communicative aspect and content of performance dance, we designed a study that objectively measures the impact of nudity or non-nudity on the ability of an erotic entertainer to effectively convey the message of her dance.

10. In designing this experiment, we actually chose to conduct two (2) separate studies. This was done for two reasons. First, one of the studies was part of a larger study involving performance dance, a great deal of which is irrelevant to the issues here and is not discussed in the final report attached hereto. Second, two different types of studies were chosen so that we would have greater confidence in our results if, in fact, any differences were measured between the nude and non-nude conditions as a result of the responses received from the participants. The first study, which I will refer to herein and which is referred to in the attached report as "Study No. 1", is what is known as a "within subjects" design. This means that every participant would see two dancers; one who danced the performance clothed, and one who danced the performance in such a fashion that she ultimately became nude at some point. In a "within subjects" design, the participant then is able to compare the two different

performances. This first study was strictly limited to the variable of nudity. The second study, which I will refer to herein and in the attached report hereto as "Study No. 2", was designed, with regard to the variable of nudity, as a "between-subjects" design. This means that participants do not see both a performance in the nude, and a performance clothed. They simply saw the same dance performance (whether it be, randomly, nude or non-nude) at varying distances (the distance variable being related to the other portion of this study that is not relevant here). As a consequence, the participants of this second study were not afforded the opportunity to compare the same dance performance in a condition of nudity and a condition where the performer was clothed. Because of this lack of comparison, it is much more difficult to obtain results where responses are different on the basis of the variable chosen (here, nudity). Thus, when differences are observed in a between-subjects study design, this indicates that the chosen variable (here, again, nudity) has an extremely strong effect on the perceptions and attitudes of the participants, and that we can be extremely confident that the measured differences are, in fact, as a result of the study variable (i.e., nudity).

11. Attached hereto is the Final Report of the Nudity and Message Effectiveness Studies that we conducted, and I incorporate by reference the text of that report herein. The final report was prepared by myself, and my associate, Dr. Daniel Linz, and the statements and findings as contained therein are true and accurate. Below is a brief description of our study design and methodology:

a. *Study Subjects.* We determined that it was appropriate to use regular patrons of an erotic dance facility inasmuch as our goal was to measure the consequences of various controls to dance entertainment upon the intended audience of such entertainment. With a random selection of subjects, there would undoubtedly be some who found any sort of nude or erotic dance objectionable. As a consequence, their responses would reflect their distaste for the dance itself, rather than the discrete variables we were attempting to measure. By selecting club patrons, our study would not suffer from this problem.

b. *The Dance.* In viewing the establishment offered at Little Darlings, it was immediately apparent that each entertainer had her own style. In order to control for variations in style which might affect the communicative aspects of the dance, i.e., one style may be more communicative than others, it was determined that it would be necessary to choreograph a single dance so that each subject was presented with essentially the same dance, with the only variables being those that we were seeking to measure. A professional choreographer was retained to choreograph a specific dance routine and to teach it to the entertainers that we were going to use in the study. Prior to the commencement of the study, I confirmed that all of the dancers knew the choreographed dance routine and could consistently perform it. I have reviewed the dance routine that was choreographed and that was used throughout these studies, and is entirely comprised of various dance performance components that are regularly used, seen and displayed in the Little Darlings club.

c. *The Entertainers.* To the extent possible, we attempted to recruit entertainers that possessed generally the same physical characteristics. In addition, the entertainers wore identical costumes, undergarments and perfume. Out [sic] goal was to reduce "attractiveness" as a variable.

d. *Study Format.* With the cooperation of Little Darlings, we isolated an area of the club with curtains. This area was divided into four areas; an area for each of three subjects, and a waiting area for the entertainers and for our observer. When seated, a subject could not view any other subject, the entertainer performing for another subject, or the entertainer waiting area.

Nine separate entertainers were used in the study. In Study 1, two (2) entertainers appeared randomly for each set of subjects. In Study 2, three (3) entertainers appeared randomly for each set of subjects. In Study 1, one of the entertainers performed in such a fashion that she ultimately became nude, and the other entertainer maintained wearing a bra and panties. In Study 2, each entertainer performed the same dance, once for each of the three (3) subjects.[1] Each subject received three (3) dances; i.e., a dance at a distance of four (4) feet, a dance at approximately six (6) inches, and a dance at six (6) inches with a single brief touch on the cheek, shoulders and forearm.[2] Half of the time, the dances were performed in a nude condition. In this condition, the dance

[1] On occasion, only two subjects would be available. On those occasions, each subject still received three (3) dances, one from each of the three entertainers dancing in that round.

[2] As discussed above, because of the additional variable of touch, no data concerning study participants who were

started with the entertainers clothed in a dress only. During the dance, the dress was removed so the entertainer was entirely nude. The other half of the time, the dances were performed in a non-nude condition. In this condition, the entertainers wore a bra and panties under the dress which were not removed when the dress was removed. In this study, each participant would see the three performers either all nude or all non-nude.

Prior to the dances, the subjects were instructed not to talk to the entertainers. This was done in order to control for the effect of verbal communication. While the dances were being performed, we stationed an observer, Eva Blumenthal, a graduate student in our communications department, in the room where she could observe each dance. Her job was to verify that each dance was performed as choreographed and that the study rules regarding verbal communication were observed.

After the dances were completed, each subject was asked to complete a questionnaire designed to measure several attributes of the dance communication.

e. *The Questions.* The questions that were contained in our studies, relating to perceptions involving the dance performances, were derived from a number of different sources. First, we were provided with copies of the United States Supreme Court decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991), and the underlying Circuit Court of Appeals decision in

subjected to the "6-inch touch" performance is included in the report attached hereto, and my opinions as contained within this Affidavit are not based upon any such data.

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990). These cases discuss, and in particular the concurring opinions in *Miller*, the "message", ideas, and concepts that are attempted to be conveyed and are conveyed in and by erotic performance dance. Second, as referenced above, an associate of mine, Dr. Beth LePoire, a professor in our department, specializes in non-verbal communication, and drafted a number of the questions, particularly with regard to the relational communication questions, as used in the study. Third, we received the input and advice of Dr. Judith Lynne Hanna, a cultural anthropologist, who has significant professional research experience both in dance and erotic performance dance, and who also provided to us various written materials on these subjects. After receiving the input of these professors, and my associate, Dr. Daniel Linz, we, in consultation with one another, came to a consensus opinion as to the questions to ultimately be used in these studies. In my professional opinion, from the legal decisions that I have been provided, from the research that I have conducted, from my review of the topical literature, from my previous professional experience and training, and from the input that I have received from my colleagues, the questions as contained in the two studies and as are reported on in the final report attached hereto, are all appropriate questions which measure the communicational aspects and attributes of erotic performance dance.

12. We began gathering data on Monday, August 21, 1995 and finished on August 24, 1995. The results of both of these studies are contained in the Final Report of Nudity and Message Effectiveness Studies attached hereto and incorporated herein by reference. The results

found in the final report are statistically significant, and contain the appropriate level and degree of confidence to enable me to reach certain conclusions as a result of these studies.

13. The findings as set forth in the final report are reported in terms of probability factors (i.e., "P < .05"). This is the confidence level that we would ascribe to the reported results. Thus, if the report shows a probability factor of .05 ("P < .05"), that means that we are 95% sure that the results that have been obtained are as a direct consequence of the variable as set forth in the study (i.e., nudity), as opposed to some random chance. The probability factors that we have utilized in these studies in order to determine statistical significance are the generally accepted levels in the scientific community.

14. In analyzing the data obtained, the appropriate scientific method would be to sum the responses to the various questions as are contained within the three categories of measurement (relational communication, erotic communication, and social communication), in order to come up with three separate composite scores. This is the appropriate scientific methodology to determine the statistical significance of the results obtained from these studies, and we have reported the data as such. We have also provided the statistically significant results obtained on separate individual questions as a result of a request of the attorneys involved in this matter.

15. The statistically significant results that we obtained in comparing responses in the nude versus the non-nude condition existed not only in the "within subjects" design of Study 1, but were also similarly present

in the "between-subjects" design of Study 2. This indicates to me as a psychologist that the effects of the variable of nudity upon the various aspects of expression conveyed by erotic performance dance are extremely strong, and are not the result of happenstance, random chance or other such factors.

16. The primary findings of these studies are that:

a. The relational communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

b. The erotic communication as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

c. The social message as expressed in erotic performance dance is significantly and substantially reduced and degraded by precluding the entertainer from becoming completely nude.

17. Based upon these findings and the results of the final report, I have reached the following conclusions which I hold in my professional opinion to a reasonable degree of scientific certainty;

a. In the context of erotic performance dance, nudity is, itself, an expressive component of the dance and not merely incidental conduct associated therewith.

b. In the context of erotic performance dance, nudity is, itself, an expressive component of the dance and not merely the manner in which such dance is performed.

c. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the relational message that is sought to be conveyed.

d. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the erotic message that is sought to be conveyed.

e. The requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the social message that is sought to be conveyed.

f. The requirement that dance performers wear covering of their genitals, breasts and buttocks does not simply make the message as expressed in the dance performance slightly less graphic; it actually effects and significantly alters the message being conveyed.

g. In the context of erotic performance dance, nudity is not simply a non-communicative element, but is, actually, an integral part of the content of the expression.

h. The requirement that dance performers wear covering of their genitals, breasts and buttocks are not, in the context of erotic performance dance, unrelated to the content of the expression that is sought to be communicated thereby.

i. Regulations that would require an erotic dance performer to maintain covering of her breasts, buttocks, and genitals are directed at the content of the expression as contained in erotic performance dance.

j. In the context of erotic performance dance, nudity is part and parcel of the relational, erotic, and social communication sought to be communicated thereby, and is not the mere manner of a performance or incidental conduct thereof.

k. The relational, erotic, and social communication sought to be communicated by erotic performance dance is significantly and substantially effected, reduced, and degraded by the requirement that performers refrain from exposing their breasts, buttocks, or genitals.

DATED at Santa Barbara, California, this 11th day of 9, 1995.

/s/ Edward I. Donnerstein
Edward I. Donnerstein

Subscribed and sworn to before me this 10th day of November, 1995.

/s/ Illegible
Notary Public

Harris, Texas County, California
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Final Report
of the
Nudity and Message Effectiveness Studies

Date: October 31, 1995

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INTRODUCTION

The purpose of this study was to determine whether the erotic, relational, and social messages conveyed by erotic dancers are significantly influenced by the variable of nudity. The first study was conducted to examine only the issue of nudity. In the second study, nudity and distance between patron and entertainer were examined as part of a larger project on erotic dance. In this report, however, we will only discuss the results as they related to nudity and those conditions which most resemble Deja Vu in the present jurisdiction. Specifically, we tested the hypotheses that: 1) partially clothed dancers would communicate a significantly *less* erotic, a *different* social message and communicate a significantly *less* intimate relational message than nude dancers. These hypotheses are pitted against the collection of "null" hypotheses offered by the plurality opinion of Chief Justice Rehnquist in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed. 2D 504 (1991), which seems to imply that the erotic, social and relational message content of erotic dancing is unaffected by this variable.

BACKGROUND

Anti-nudity Statutes and Erotic Expression

Although divided as to exactly why, five members of the Supreme Court in *Barnes v. Glen Theatre* (1991) agreed that an Indiana statute prohibited nude dancing performed as entertainment did not violate the First Amendment. Chief Justice Rehnquist expressed the view that nude dancing as entertainment is expressive conduct within the outer perimeters of the First Amendment, but

application of the Indiana statute to such dancing was justified, despite the statutes incidental limitations on some expressive activity. Applying the four part *O'Brien* test (*U.S. v. O'Brien*, 391 U.S. 367, 1968), Chief Justice Rehnquist found that the Indiana anti-nudity statute was: (a) within the state's constitutional power, (b) designed to protect public morals and public order and thus furthered a substantial governmental interest, and was (c) unrelated to the suppression of free expression, in that the perceived evil that Indiana sought to address was not erotic dancing but rather public nudity. Finally, the requirement that the dancers wear at least "pasties" and a "G-string" was, in Chief Justice Rehnquist's opinion narrowly tailored to achieve the state's purpose.

Specifically with regard to part "c", The Chief Justice offered the opinion that " . . . the requirement that the dancers don pasties and G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic. The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. This conclusion is buttressed by a reference to the facts of *O'Brien*. In *O'Brien*, an act of Congress provided that anyone who knowingly destroyed a selective service registration certificate committed an offense. O'Brien burned his certificate on the steps of the South Boston Courthouse to influence others to adopt his anti-war beliefs. The Supreme Court upheld his conviction, reasoning that the continued availability of issued certificates served a legitimate and substantial purpose in the administration of the selective service system. O'Brien's deliberate destruction of his certificate frustrated this purpose and for this non-communicative

aspect of his conduct, and for nothing else, he was convicted. It was assumed that O'Brien's act in burning the certificate had a communicative element in it sufficient to bring into play the First Amendment, but it was for the noncommunicative element that he was prosecuted. So here with the Indiana statute; while the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done "in the nude."

The dissenting opinion in *Barnes* concurred with the Seventh Circuit Court of Appeals which had earlier ruled the Indiana ordinance unconstitutional, finding that nude dancing conveyed a "message of temptation and allurement" that was protected by the First Amendment. The dissent noted that in arriving at its decision, the Plurality had conceded that nude dancing conveys an erotic message, and concluded that the message would be muted if dancers were required to wear pasties and G-strings. The dissent asserted that " . . . the emotional or erotic impact of the dance is intensified by the nudity of the performers . . . the nudity of the dancer is an integral part of the emotions and thought that a nude dancing performance evokes. The sight of a fully clothed, or even partially clothed dancer generally will have a far different impact on a spectator than that of a nude dancer, even if the same dance is performed."

Theoretical Background

Nudity. Social psychological and communication theory would suggest that contrary to Chief Justice Rehnquist's assertions in *Barnes*, nudity will influence

judgements and attitudes among those who view an erotic dance. Nude photographs are rated as more "erotic" by viewers and greater attention is paid to the nude than clothed actor, and cognitions about sex and pleasure are stimulated in the viewer which are reinforcing under conditions of nudity. The message of eroticism is considered to be higher.

Social messages are also conveyed by nudity. Nudity may convey a social message that women can express themselves as freely as men or that the female body is beautiful. In art, the naked form is presupposed to be beautiful. Nakedness has been traditionally associated with freedom in our culture. Recently, the argument has been made that women should be free to express their sexuality. Nudity could symbolize these messages.

Relational messages should also be affected. Nudity should make a difference in areas like expressing intimacy, liking, and desire because of sensory involvement and changed expectations about behavior among the interaction participants. These cues and expectations influence how we perceive and provide a frame of reference for interpreting the communication.

The language of the questions asked participants in this study was drafted so as to be both scientifically sound and consistent with legal definitions applicable to the law in this case. In deciding the types of questions to, we relied upon decisions in *Barnes* and in *Miller v. Civil City of South Bend*, 904 F2d 1081, 1089 (7th Cir. 1990), as well as psychological and communication theory. For example, using Miller we selected the question asking if

the dancer's dance was "alluring with a message of temptation" (*Miller v. Civil City of South Bend*, 904 F2d 1081, 1089 (7th Cir. 1990). Experts in dance (Professor Judith Hanna) and relational communication (Dr. Beth LePoire) were consulted for advice on other questions.

STUDY I

METHOD

Subjects

Twenty male patrons of the Little Darlings dance club of Las Vegas were recruited for participation in the study.

Design

A two-level, within subjects design (dancer nude v. dancer partially clothed), was employed. Patrons viewed two dancers in random order.

Materials

Consent form. Participants were asked to read and sign a consent form which read as follows:

> This is to acknowledge that I have been informed that I will be asked to view three adult entertainment dances. Each dance will last approximately 3 minutes. I understand that these dances may involve nudity. I also understand that during the three dances **I am not to talk to the dancers** and while performing the dancers will not talk to me except to introduce themselves. I also understand that **I am not allowed to touch any of the dancers**. I further

understand that I will be asked to complete a short questionnaire before I see the dances and one or more short questionnaires after I have seen the dances. **Your Participation in this study and any answers which you give will be completely *confidential*.** I understand that if I have any problems during the study I am to contact any one of the staff personnel who will answer any questions or address any concerns I may have. **I understand that for my participation, which will last approximately 20 minutes, I will be provided a Deja Vu VIP Card which can be used at Deja Vu clubs nationwide.** My signature below indicates that I have freely volunteered for this dance evaluation and understand what I will be asked to do during this evaluation.

Pre-dance questionnaire. Before viewing the erotic dance, participants completed a questionnaire which asked them to report: 1) Business or a personal relationship with anyone that worked in this Little Darling's establishment, Deja Vu dance clubs across the country, or with anyone in the exotic dance industry; 2) If they had heard anything about this study or the specific questions asked; 3) Whether that [sic] had previously visited this Little Darlings club or any club where nude or exotic dancing is offered; and 4) Employment in any capacity in law enforcement. If the participant answered YES to questions 1, 2 or 4, they were to be deleted from the study. No participants answered YES. In addition, demographic information including, age, race, religiosity, marital status, income, political orientation (Conservative-Liberal), and level of education was requested of the participant.

Post-dance questionnaire. After viewing the dances, the participants completed a questionnaire which contained the following items relevant to this study measuring relational, erotic and social communication.
1. Relational communication. "Did you feel that the dancer was expressing to you through her dance the fantasy that: (a) She wanted to make you feel like you were a special person? (b) She liked you? (c) She was personally interested in you? (d) She desired you? (e) There was intimacy between the two of you? (f) She wanted to be romantically involved with you?"

2. Erotic communication. "The Dancer's dance was: (a) Passionate. (b) Artistic. (c) Sexy. (d) Erotic. (e) Alluring with a message of temptation. (f) Seductive. (g) Stimulating. (h) Personal."

3. Social message. "Did the dancer express to you that: (a) Women can express themselves as freely as men? (b) She was free to do what she wanted with her body? (c) The female body is beautiful?"

Each question subcomponent was followed by a "Definitely Yes" to "Definitely No" response scale anchored by the numbers 1 and 8. The were also asked if they had ever had a private one on one dance with this entertainer? If they answered YES they were to be eliminated from the analysis. No subjects answered YES.

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants visiting the club between 12:00pm and 9:00pm during the week of August

19-23, 1995, were randomly recruited to watch two dances. The recruitment was done by Dr. Dale Kunkel and/or Mr. Tim Gray of the University of California-Santa Barbara. The solicitation of participants used the following outline:

> Hello. My name is _____. I work for a research company that has been hired by the club to study how people react to several different types of dances that they might want to use in the club. We are recruiting participants for the study right now. We need people who are willing to watch two dances we are evaluating. Each dance will be done privately for you by a different woman. After you have seen each dancer, you will then be asked to fill out a questionnaire that tells us what you think about each of the dances. If you are willing to participate, I can offer you a VIP card which allows free admission to any Deja Vu club. It will only take about 15-20 minutes to complete the study. Would you like to do this?

After being recruited, two participants at a time were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the following instructions about the completion of the Pre-dance questionnaire:

> Before we have you view the dances, we need you to answer a few questions about yourself. All of the information you provide is confidential and fully anonymous. It will never be examined individually. We are interested only in the overall reactions of large groups of people. Please complete this questionnaire and return it to me when you've finished. Let me know if you have any questions. Once you're finished, it will just be a short wait before we begin the dances.

After completing the form, the two participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you two dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the second dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed two dancers performing; one nude and one non-nude dance. Each dance was 3 minutes in length. The dance routine and the music accompanying the dance were held constant across the nude and non-nude conditions. It is important to note that except for the nude vs non-nude part of the dance, all other aspects of the dance were identical (e.g., same shoes, costume, perfume, distance, lighting, music, etc.). The dancers were trained by a professional dance choreographer so as to assure that each dance was identical except for the condition of nudity. All dancers began their routine with a black dress which was removed within

seconds of the beginning dance. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. Eight dancers were randomly assigned to the nude and not nude conditions. The dancer in any one sequence would perform nude (or non-nude) for one participant and then move over to the next participant to perform the same dance. In a following sequence the same dancer would perform non-nude (or nude). In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of California-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray which contained a picture of each of the dancers they had seen. Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS OF EXPERIMENT I

Relational Communication. There were six items which comprised the Relational Communication questions. The question and items were as follows:

Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?
2. She liked you?
3. She was personally interested in you?
4. She desired you?
5. There was intimacy between the two of you?
6. She wanted to be romantically involved with you?

These six items were summed to form a composite measure for *Relational Communication*. A t test (Nude vs Not Nude) on the *Relational Communication* measure revealed a significant effect for Nudity ($p<.005$), with Nude dancers being rated as more generally expressive overall than their Non Nude counterparts. These results are displayed in **Figure 1.**

Individual analysis on each of the six items showed significant effects on the following questions:

a. She wanted to make you feel like you were a special person ($p<.05$)

b. She liked you ($p<.01$)

c. She was personally interested in you ($p<.01$)

d. There was intimacy between the two of you ($p<.05$)

e. She wanted to be romantically involved with you ($p<.06$)

These results are displayed in **Figure 2.** In all cases, Nude dancers were rated more expressive on each of these items than Non Nude dancers. The remaining item, while

not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Erotic Communication. There were eight items which comprised the *Erotic Communication* questions. The question and items were as follows:

The Dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form a composite measure for *Erotic Communication*. A t test (Nude vs Not Nude) on the *Erotic Communication* measure revealed a significant effect for Nudity ($p<.03$), with Nude dancers being much more erotic overall than their Non Nude counterparts. These results are displayed in **Figure 1.**

Individual analysis on each of the eight items showed significant effects on the following questions:

a. Erotic ($p<.01$)

b. Alluring with a message of temptation ($p<.05$)

c. Stimulating ($p<.01$)

These results are displayed in **Figure 3.** In all cases, Nude dancers were rated much more expressive on each of these items than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Social Items. Three additional questions were asked in this study. They were: Did the dancer express to you that:

1. Women can express themselves as freely as men?
2. She was free to do what she wanted with her body?
3. The female body is beautiful?

These three items were summed to form a composite measure for *Social Communication*. A t test (Nude vs Not Nude) on the *Social Items* measure revealed a significant effect for Nudity ($p<.04$), with Nude dancers being rated as more generally expressing these social communication points than their Non Nude counterparts. These results are displayed in **Figure 1**.

Individual analysis on each of the items showed the following significant effects:

a. Women can express themselves as freely as men ($p<.05$)

b. She was free to do what she wanted with her body ($p<.06$)

Nude dancers received a higher agreement score than Non Nude dancers on each of these items. This result is presented in **Figure 4.** The remaining item, while not

statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

STUDY 2

METHOD

Subjects

Thirty male participants in the Little Darlings dance club of Las Vegas who had been recruited for participation in a larger study involving other (besides nudity) aspects of performance dance fell within the categories relevant for this limited study of the effects of nudity.

Design

A 2 X 3 mixed, within-subjects and between-subjects factorial design was employed. The within subjects variable was distance from participant (4 feet, 6 inches, or 6 inches with touch[1]).

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[1] The present study will only analyze the results for the 4 foot and 6 inch condition. The 6 inch touch condition was examined for a larger study as part of this project. The touch condition is another variable of interest in performance dance, but is not of concern in the present case. Given that the participants viewed the dances in random order, it is methodologically and statistically appropriate to exclude the 6 inch touch condition from our analysis. We should note that the effects of nudity on all measures would actually be significantly stronger had the touch condition been included in the analysis.

The two between-subjects variables were nudity (dancer nude or non-nude).

Materials

Consent form. Participants were asked to read and sign a consent form like that of Study 1.

Questionnaires. Pre- and post-dance questions were identical to Study 1, with the exception of Social Message questions.[2]

Procedure

The study was conducted at the Little Darlings dance club, Las Vegas, Nevada. Participants were recruited in a manner similar to that of Study I by Dr. Kunkel and Mr. Gray between 12:00pm and 9:00pm during the week of August 19-23, 1995. For this study 3 participants at a time were recruited.

After being recruited, the participants were taken to a closed off room in the back of the main club area where they read and signed the Consent form. They were then provided the instructions about the completion of the Pre-dance questionnaire as were used in Study 1.

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[2] Study 2 was conducted prior to Study 1. It was a larger study which was interested in other variables (distance, lighting) not at issue in the present case. Upon the completion of this larger study, a smaller study concerned only with nudity (Study 1) was conducted. The researchers decided to add the Social Communication questions to this smaller study. Consequently, they are not part of the present study and analysis.

After completing the form, the participants were taken to an adjoining room where they were to watch the dances. The participants were separated from each other by a partition. Once seated, they were given the following instructions:

> We are going to show you three dances. Each one will be presented by a different performer. It is important that you *do not talk to or touch* any of the dancers. There will be a brief pause between each dance. Please stay seated until the last dance has been completed. Do not offer the dancers any tips or money. Afterwards, I will give you a questionnaire that asks you how you felt about each of the dances. Remember that we are interested in getting your reaction to each dance that you see. We are not trying to evaluate the women who are dancing. Nothing that you tell us will be used to affect a dancer in any way. Once you have completed the questionnaire, I will give you the special VIP card for future admission to any Deja Vu dance club as our thanks for your help.

Participants then viewed the three dances, one at a time, in random order. Eight dancers were employed and randomly assigned three at a time to distance conditions. The dance routine and the music accompanying the dance were held constant except for variations in distance. The dancers were trained by a professional choreographer to perform exactly the same routine at each distance, save a brief touch to the shoulders and arms under the 6 inch touch distance (see footnote 1). During any one sequence of three dances, all the dancers performed either Nude or Non-nude. The Nudity condition was reversed for the next sequence. Each dance was 3

minutes in length. As in Study 1, all aspects of the dance were identical (e.g., same shoes, costumes, perfume, distance, lighting, music, etc.) except for the distance from the participant and the variable of nudity. All dancers began their routine with a black dress which was removed within seconds of the dance commencing. Dancers in the non-nude condition were clothed in a bra and panty, while those in nude condition did not wear these items of clothing. In order to assure that the dancers were performing the correct routine, Ms. Eva Blumenthal of the University of Califomia-Santa Barbara coordinated the schedules of the dancers and observed all performances.

After viewing the dances, the participants were taken back to the adjoining room where they had completed the earlier consent form. They were given the Post-dance questionnaire by Dr. Kunkel and Mr. Tim Gray, which contained a picture of each of the dancers they had seen. They were also asked if they had ever had a private one on one dance with this entertainer. If they answered YES they were to be eliminated from the analysis (2 participants did answer Yes and their responses are not included). Dr. Kunkel and Mr. Gray explained how to complete the questionnaire and answered any questions the participant had. Subjects were separated in distance in order that they could not view each others responses. Upon completion of the questionnaire, the participant was thanked for their participation and presented the VIP card.

RESULTS OF EXPERIMENT 2

Relational Communication. There were six items which comprised the *Relational Communication* questions. The question and items were as follows: Did you feel that the dancer was expressing to you through her dance the fantasy that:

1. She wanted to make you feel like you were a special person?
2. She liked you?
3. She was personally interested in you?
4. She desired you?
5. There was intimacy between the two of you?
6. She wanted to be romantically involved with you?

Subjects responses were summed to form one composite score on *Relational Communication* and subjected to a 2 x 2 Analysis of Variance (ANOVA) with Nudity (Nude vs Not Nude), and Distance (4 feet vs 6 inches) as factors. The analysis revealed significant effects for *Nudity* ($p<.03$) and *Distance* ($p<.01$). There were no significant interactions, indicating that Nudity by itself had a significant impact on the effectiveness of *Relational Communication,* with Nude dancers being rated more expressive overall than their Non Nude counterparts. These results are presented in **Figure 5.**

Individual analysis on each of the six items showed significant effects for Nudity on the following questions (there were no Nudity x Distance interactions):

a. She wanted to make you feel like you were a special person ($p<.03$)

b. She was personally interested in you ($p<.05$)

c. She desired you ($p<.02$)

d. She wanted to be romantically involved with you ($p<.05$)

These results are displayed in **Figure 6.** In all of these cases Nude dancers were rated more expressive than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant.

Erotic Communication. There were eight item [sic] which comprised the *Erotic Communication* questions. The question and items were as follows: The Dancer's dance was:

1. Passionate
2. Artistic
3. Sexy
4. Erotic
5. Alluring with a message of temptation
6. Seductive
7. Stimulating
8. Personal

These eight items were summed to form one composite score on *Erotic Communication* and subjected to a 2 x 3 ANOVA with Nudity (Nude vs Not Nude) and Distance

(4 feet vs 6 inches) as factors. The analysis revealed a significant effects [sic] for Nudity ($p<.02$). There were no interaction effects. Results showed that Nude dancers were rated as much more significantly erotic overall than their Non Nude counterparts. These results are displayed in **Figure 5**.

Individual analysis on each of the eight items showed significant effects for Nudity on the following questions (there were no Nudity x Distance interactions):

a. Passion ($p<.02$)

b. Artistic ($p<.06$)

c. Erotic ($p<.01$)

d. Alluring with a message of temptation ($p<.04$)

e. Stimulating ($p<.06$)

These results are displayed in **Figure 7**. In all of these cases, Nude dancers were rated more expressive on [sic] than Non Nude dancers. The remaining items, while not statistically significant, showed the same pattern of results, and had more participants been used in this study, the results would have been statistically significant (except for Personal).

DISCUSSION

Governmental restrictions on nudity, when applied to the context of erotic performance dance, are not merely time, place and manner restrictions that have no impact on the content of speech. Nudity is, itself, a part of the communication expressed in erotic performance dance. These restrictions are related to the content of erotic

performance dance expression, and significantly and substantially alter the content of the message being conveyed by the performer and the meaning ascribed to the dance by the viewer. Significant and substantial changes in the erotic message, relational message, and social messages of erotic performance dance is noted when the entertainers refrain from exposing their breasts, genitals, and buttocks. The present studies strongly demonstrated that the effectiveness of the communication as contained in a dancer's performance was significantly altered by the condition of nude vs. Non-nude. Overall, nude dancers were seen as expressing a significantly stronger relational, erotic, and social message than non-nude dancers. There is no question from these studies that the effectiveness and content of these messages are significantly impacted by nudity of the law thereof.

REFERENCES

Barnes v. Glen Theatre, 501 U.S. ___, 115 L.Ed.2d 504, 511, 514 (1991)

Miller v. Civil City of South Bend, 904 F2d 1081, 1089 (7th Cir. 1990)

O'Day et al. v. King County, 1988

U.S. v. O'Brien, 1968

LIST OF FIGURES

Figure 1: Effect of Nudity on Combined Communication Scales – Study 1

Figure 2: Effect of Nudity on Relational Communication Items – Study 1

Figure 3: Effect of Nudity on Erotic Communication Items – Study 1

Figure 4: Effect of Nudity on Social Communication Items – Study 1

Figure 5: Effect of Nudity on Combined Communication Scales – Study 2

Figure 6: Effect of Nudity on Relational Communication Items – Study 2

Figure 7: Effect of Nudity on Erotic Communication Items – Study 2

Figure 1

Effect of Nudity on Combined Communication Scales

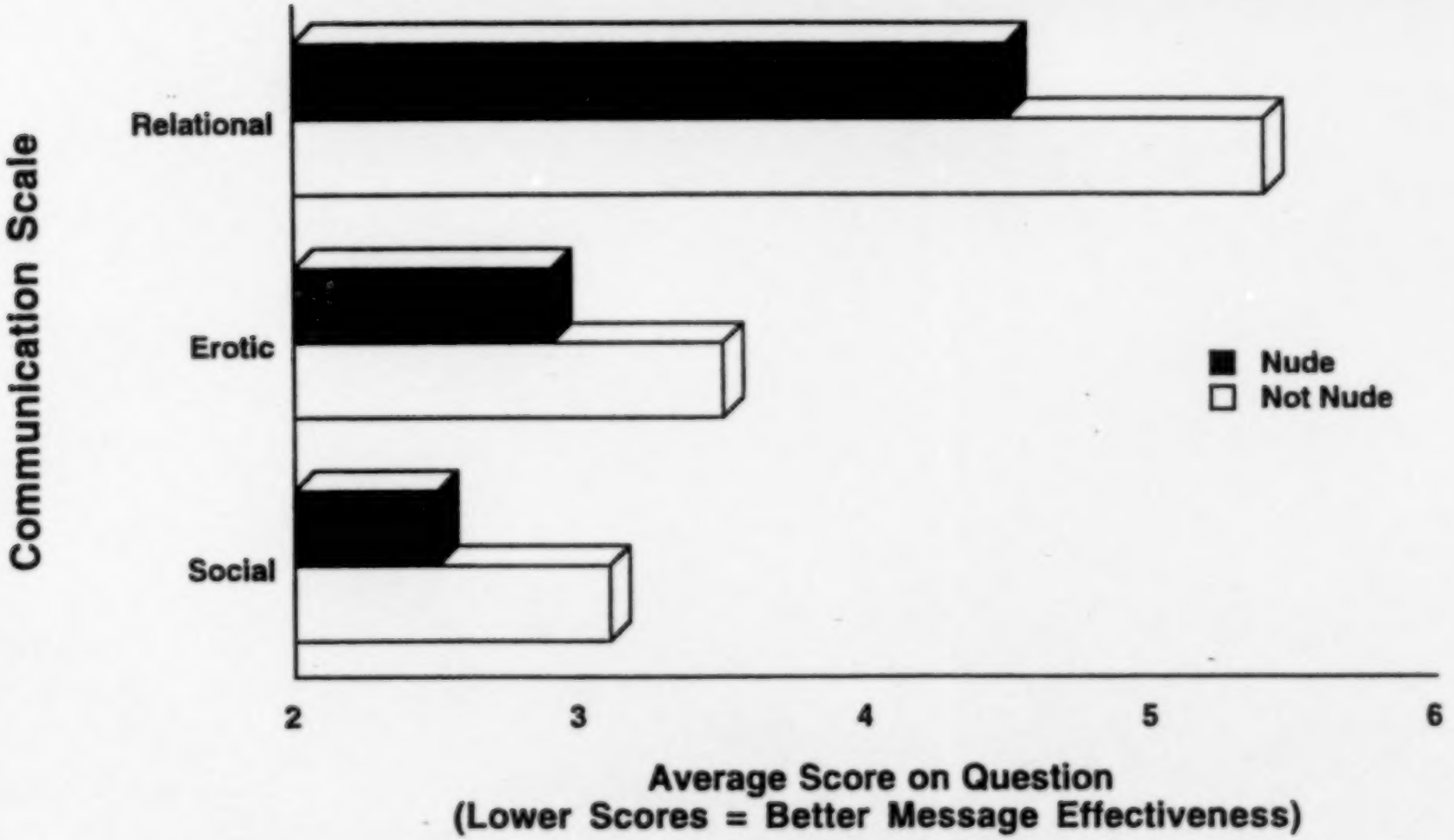


Figure 2

Effect of Nudity on Relational Communication Items

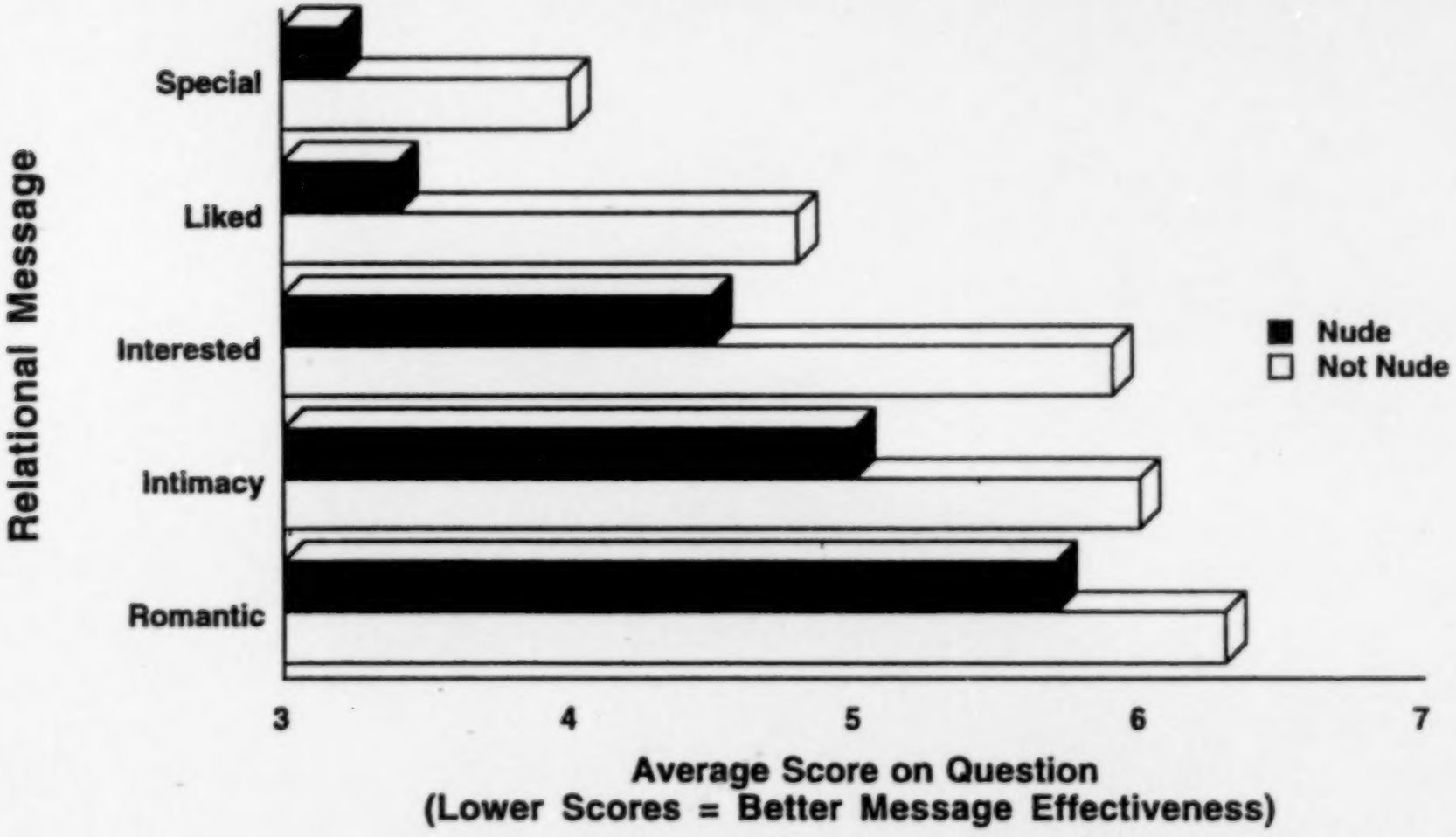


Figure 3

Effect of Nudity on Erotic Communication Items

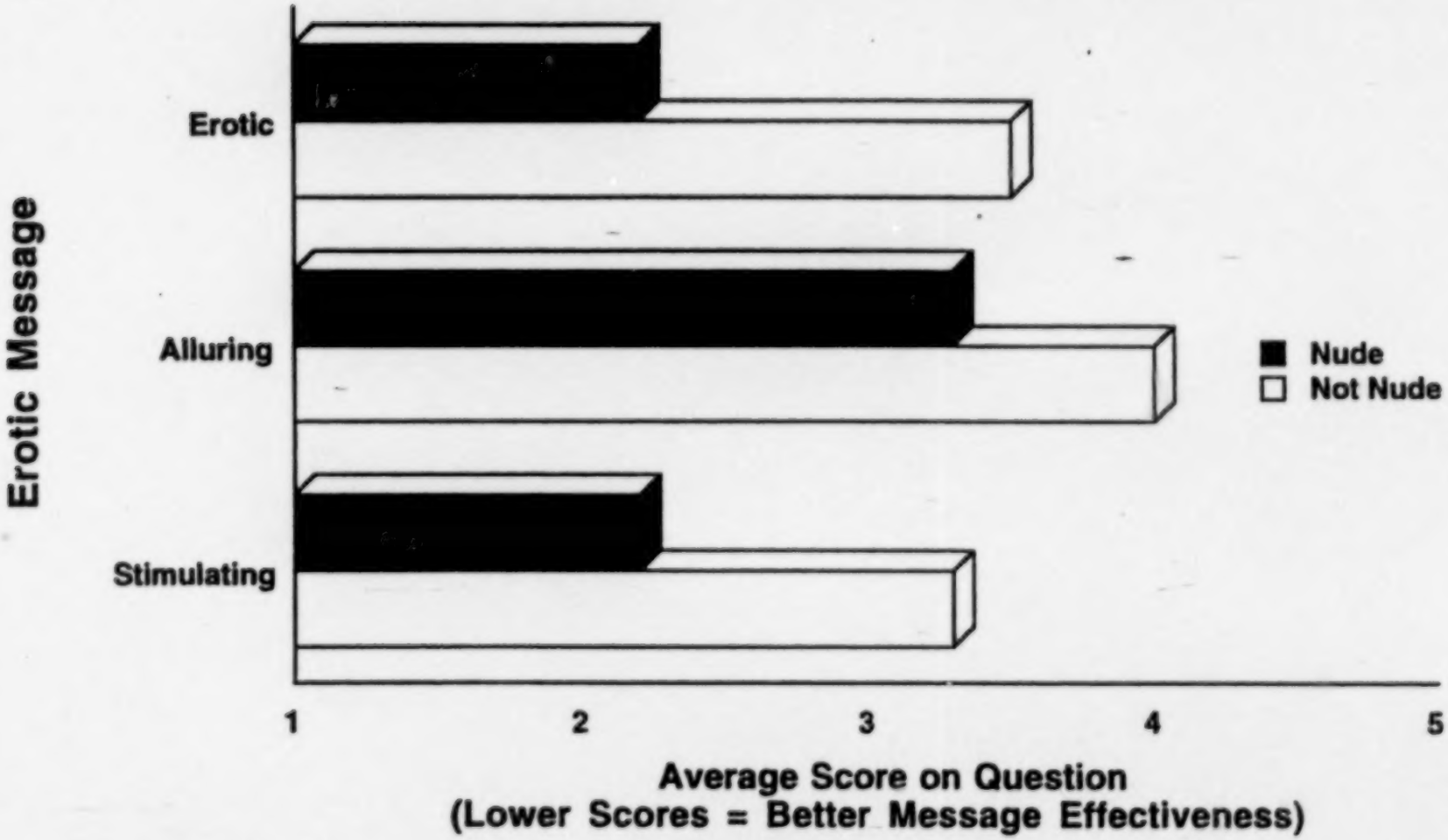


Figure 4

Effect of Nudity on Social Communication Items

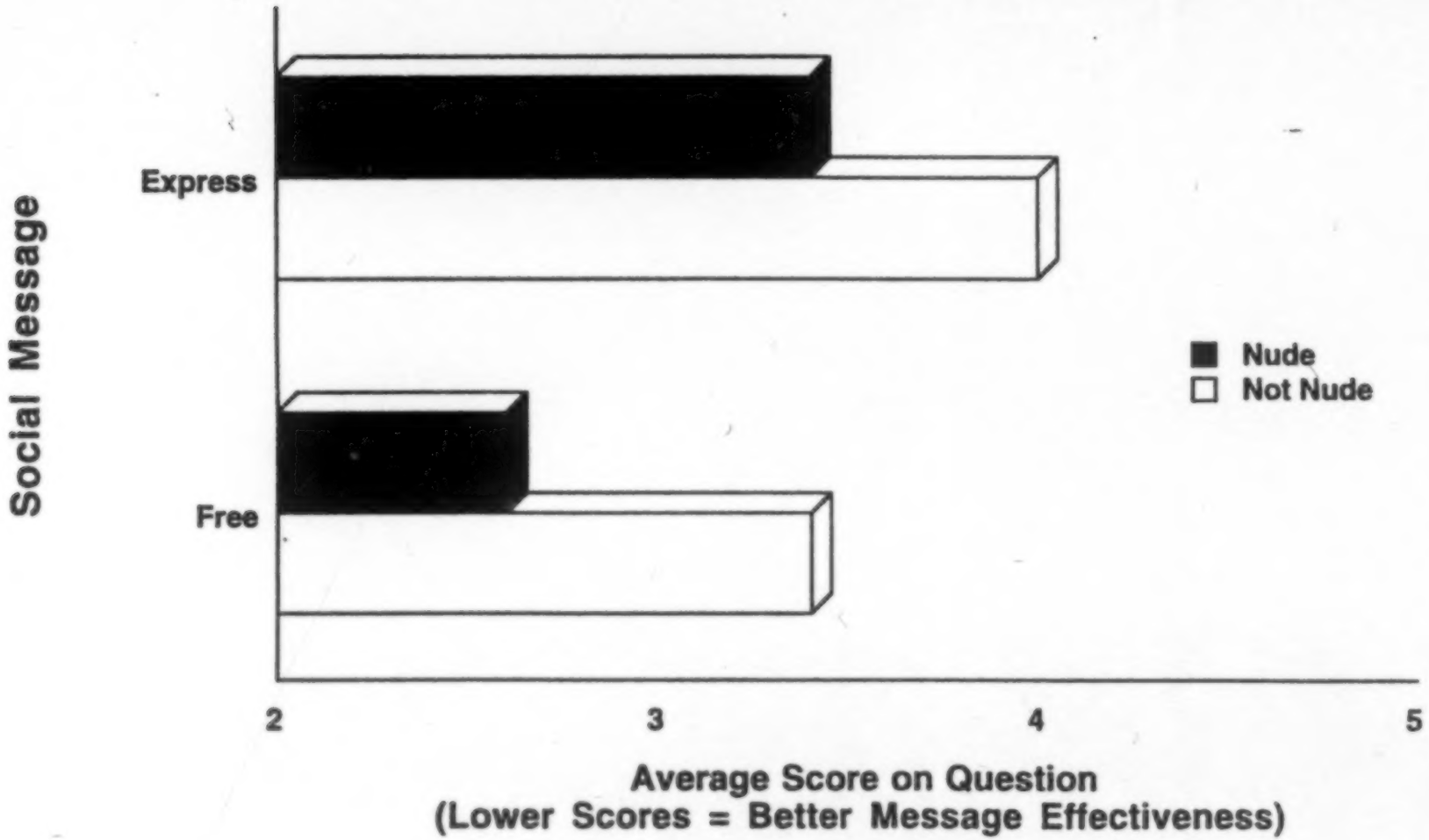


Figure 5

Effect of Nudity on Combined Communication Scales

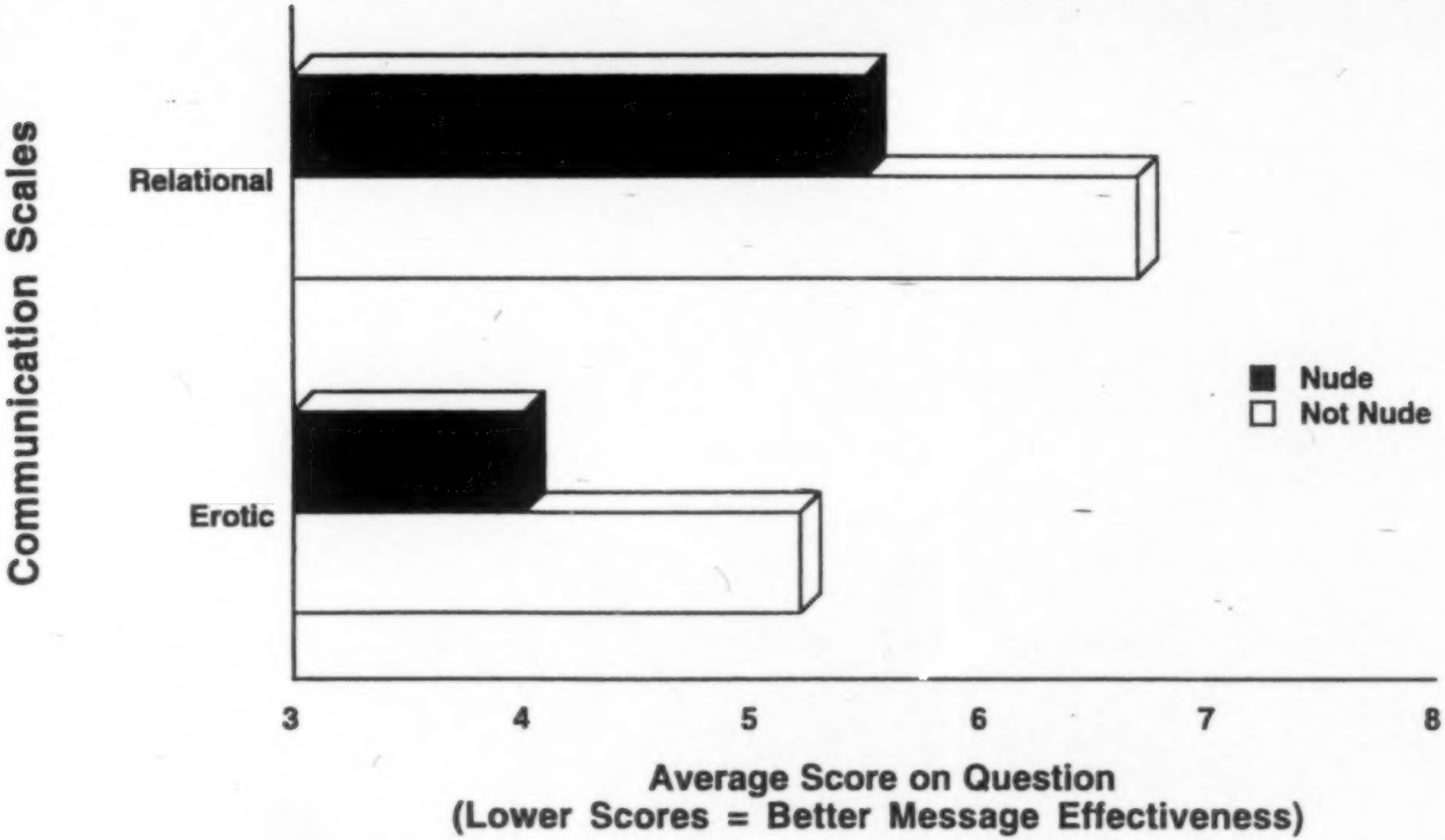


Figure 6

Effect of Nudity on Relational Communication Items

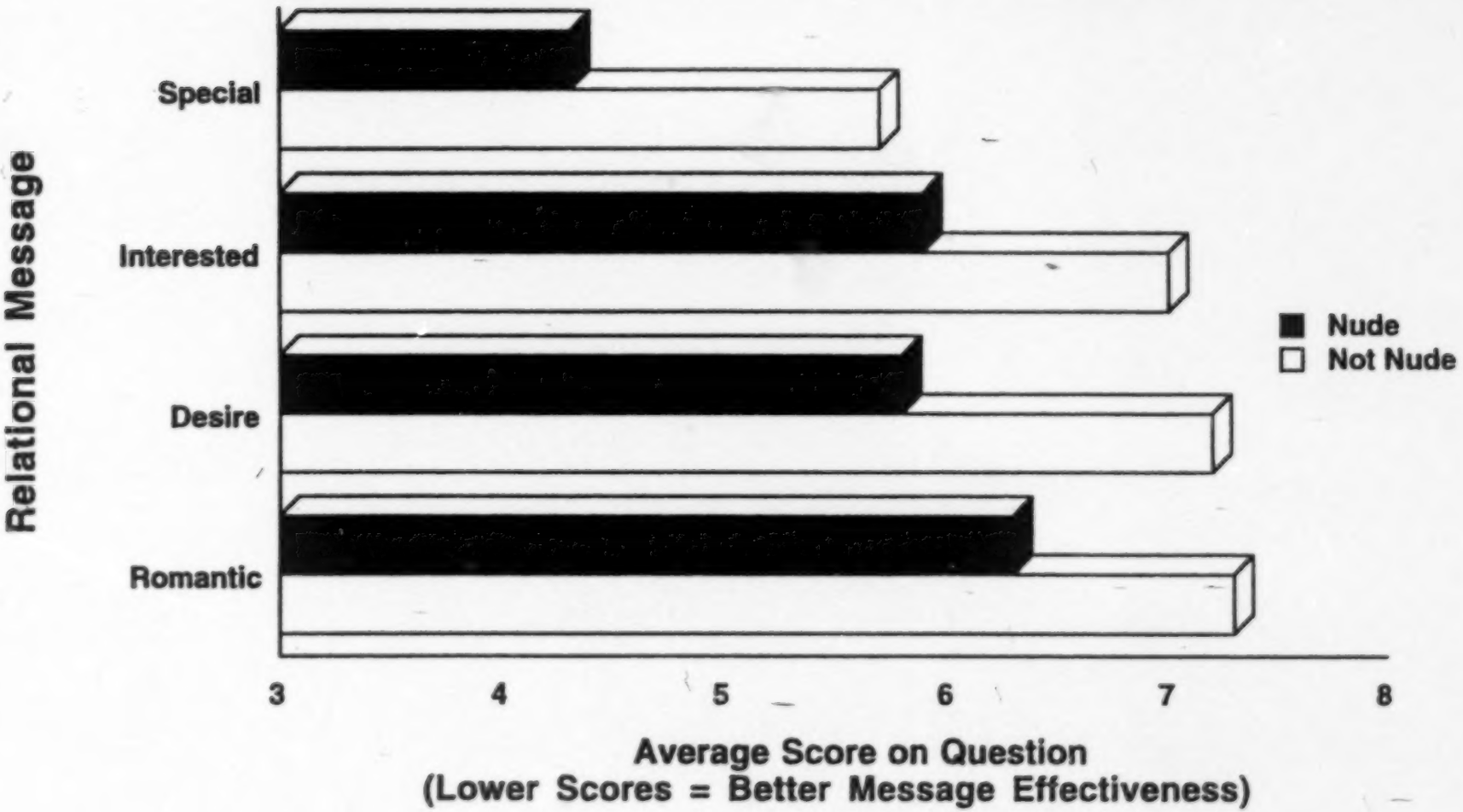
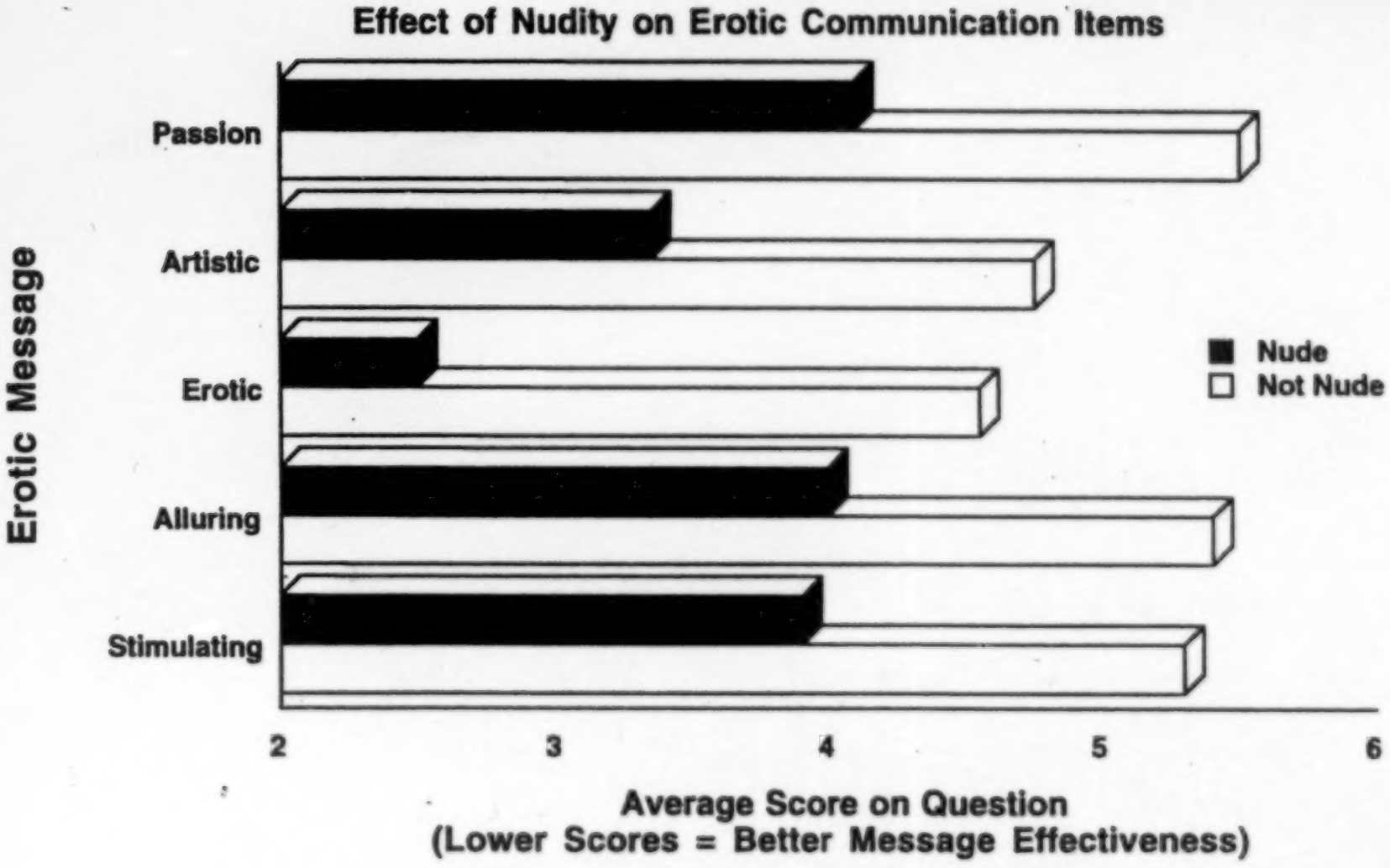


Figure 7


Effect of Nudity on Erotic Communication Items
Erotic Message
Passion
Artistic
Erotic
Alluring
Stimulating
Nude
Not Nude
2
3
4
5
6
Average Score on Question
(Lower Scores = Better Message Effectiveness)

Supreme Court, U.S.
9/30/99

No. 98-1161

IN THE

Supreme Court of the United States

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BRABENDER, DENISE ROBISON, and JAMES N. THOMPSON, all in their official capacities,

Petitioners,

v.

PAP'S A.M., T/D/B/A "KANDYLAND,"

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

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September 30, 1999

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding in 1920, the ACLU has vigorously defended the free speech principles of the First Amendment and has appeared before this Court on numerous occasions, both as a party and as *amicus curiae*, in cases challenging governmental actions that threaten First Amendment rights. Because this case addresses important First Amendment questions, its proper resolution is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

On September 28, 1994, the City Council for the City of Erie ("Erie" or "City") enacted Ordinance 75-1994 ("Ordinance") making it a crime to appear "in a state of nudity" in public. Pet. App. 8a.[2] As explicitly stated in the Ordinance's preamble, the Ordinance was enacted

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or counsel contributed money or services to the preparation or submission of this brief.

[2] According to the Ordinance, "'[n]udity' means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; [and] the showing of the female breast with less than a fully opaque covering of any part of the nipple." *Id.* The Ordinance also prohibits people from wearing a "costume" that "simulates" the proscribed body parts. *Id.*

> *for the purpose of limiting a recent increase in live nude entertainment* within the City, which activity adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.

Id. at 7a (emphasis added). In enacting the Ordinance, the City Council repealed and replaced the City's 128-year-old "Indecency and Immorality" law, which prohibited persons from engaging in "indecent" sexual conduct in public but did not outlaw public nudity. At the time the Ordinance was enacted, city law already regulated the location of adult entertainment establishments within the City of Erie. *See* J.A. at 42-43 (statement of Councilman Bagnoni). Nevertheless, the City deemed it necessary to adopt the Ordinance to ensure that nude dancing did not occur at all within the City limits. *See id.* at 37-43 (statements of Council members Robison, Thompson, and Bagnoni).

Shortly after the Ordinance went into effect, Respondent Pap's A.M. ("Pap's"), the owner of a nude dancing establishment in Erie operating under the name "Kandyland," brought an action in state court for declaratory and injunctive relief, alleging, among other things, that the Ordinance violated the First Amendment of the United States Constitution. On January 18, 1995, the trial court permanently enjoined enforcement of the Ordinance, concluding that the law was constitutionally overbroad. *Pap's A.M. v. City of Erie*, No. 60059-1994, 1995 WL 610276 (Pa. Common Pleas Jan. 18, 1995). The state appellate court reversed. *Pap's A.M. v. City of Erie*, 674 A.2d 338 (Pa. Commw. Ct. 1996). Adopting Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581-87 (1991) (Souter, J., concurring), the Commonwealth Court concluded that the Ordinance furthered a governmental purpose — combating the so-called "secondary effects" of nude dancing — that was unrelated to the suppression of speech, and, therefore, the Ordinance survived intermediate First Amendment scrutiny. *Pap's A.M.*, 674 A.2d at 344. The Supreme Court of Pennsylvania reversed the appellate court. *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998). Unable to find a guiding opinion in *Barnes*, the Pennsylvania Supreme Court concluded that the Ordinance was enacted for the purpose of restricting "the erotic message of the dance." *Id.* at 279. The Pennsylvania Supreme Court thus applied strict scrutiny and held the Ordinance unconstitutional. *Id.* at 280. This Court granted the City's Petition for a Writ of Certiorari on May 17, 1999.

SUMMARY OF ARGUMENT

1. Petitioners concede that the Erie Ordinance, like the statute at issue in *Barnes*, must receive heightened scrutiny under the First Amendment. As a majority of this Court recognized in *Barnes*, laws that have the effect of burdening expressive activities must be subjected to heightened scrutiny, even if those laws also apply to nonexpressive activities. *See* 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). To withstand respondent's First Amendment challenge, therefore, petitioners must show, at the least, that the Ordinance furthers a substantial government interest unrelated to the suppression of expression, and that the resulting burden on nude dancing is "no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

The need for heightened scrutiny is especially clear where, as here, a law explicitly states that it is regulating conduct *for the purpose* of prohibiting a category of speech. Thus, this Court has recognized the importance of applying heightened scrutiny even to generally applicable laws if those laws were enacted in order to burden First Amendment rights. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Indeed, the Ordinance's explicit targeting of a particular form of expressive conduct — a content-based legislative distinction — probably warrants strict scrutiny. Nevertheless, the Court need not reach that question because the Ordinance also fails under the intermediate scrutiny test applied by the plurality and Justice Souter in *Barnes*.

2. The "secondary effects" rationale applied by Justice Souter in his concurring opinion in *Barnes*, and adopted by petitioners in this case, cannot justify Erie's total ban on nude dancing. Petitioners attempt to fit this case within the analysis established by the Court in *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), for evaluating laws that regulate the time, place, and manner in which "adult entertainment" can occur within a community. But the *Renton* rationale cannot be stretched so far. *Renton* held that a community may restrict the *location* of adult movie theaters based on the "secondary effects" associated with such theaters, without being deemed to have engaged in impermissible content-discrimination based on the films themselves. Here, the "secondary effects" rationale is not used to justify a zoning restriction (which previously existed) but a total ban on nude dancing. Under *Renton*, as under other forms of intermediate scrutiny, the government must offer some evidence that the means it has chosen will further its stated ends. In this context, that means that petitioners must show that "secondary effects" will result from the (prohibited) nude dancing but not from the (permitted)

partially-clad dancing. That assertion, however, is not only unsupported in the record, it is inherently implausible. In addition, this justification necessarily relates to the *primary* effect of nude dancing on its viewers — an effect that the Court has consistently rejected as a permissible reason to restrict expression.

3. The view that restrictions on First Amendment rights may be justified by the government's interest in "morality" did not command a majority in *Barnes* and represents a significant departure from constitutional jurisprudence. The Court has never held that "morality," without more, is sufficient to justify restrictions on a fundamental constitutional right. Indeed, the decision to apply intermediate scrutiny — as the *Barnes* plurality did — involves a recognition that fundamental First Amendment rights are implicated by laws that impose incidental burdens on speech. If intermediate scrutiny is to have any force, therefore, the government must point to something more than an interest in "morality" to justify a burden on the right to freedom of expression.

ARGUMENT

Five members of this Court in *Barnes* applied a variety of inconsistent rationales to uphold a public nudity law as applied to ban nude dancing. This case, we submit, illustrates some of the problems and pitfalls created by that ruling. As indicated above, we believe that *Barnes* can be distinguished on the ground that this case involves a law directly targeted at expressive activity. But to the extent that this Court concludes otherwise, *amici* respectfully submit that *Barnes* should be reconsidered.

I. THE ERIE ORDINANCE REQUIRES HEIGHTENED FIRST AMENDMENT SCRUTINY.

Petitioners concede, as they must, that nude dancing is expressive conduct protected by the First Amendment. Pet. Br. at 6-7; *see Barnes*, 501 U.S. at 565-66 (plurality opinion); *id.* at 581 (Souter, J., concurring); *id.* at 587 (White, J., dissenting); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *see also California v. LaRue*, 409 U.S. 109, 116-18 (1972). They also concede that the Ordinance is subject to at least intermediate scrutiny under the First Amendment. Pet. Br. at 25-29.

The latter concession is plainly appropriate. Like the statute at issue in *Barnes*, Erie's Ordinance prohibits all nude dancing from occurring anywhere within the city. As a majority of the Court recognized in *Barnes*, laws (such as the Erie Ordinance) that have the effect of restricting expressive activity must be subjected to heightened scrutiny under the First Amendment. 501 U.S. at 566-67 (plurality opinion); *id.* at 582 (Souter, J., concurring); *id.* at 592-93 (White, J., dissenting). This is true regardless of whether the Ordinance's prohibitions also apply to nonexpressive acts of public nudity; the First Amendment requires that laws which incidentally burden expressive conduct be closely examined to ensure they are not used impermissibly to suppress expression. *See, e.g., id.* at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *O'Brien*, 391 U.S. at 376.

Thus, as eight Justices ruled in *Barnes*, Erie's Ordinance must at a minimum satisfy the test set forth in *O'Brien*. Specifically, the Court must determine whether the law serves

a governmental interest that is "important or substantial," whether that interest is "unrelated to the suppression of free expression," and whether the incidental burden on expression is "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

Unlike petitioners, the attorneys general of several states, as *amici*, urge this Court not to apply any form of heightened First Amendment scrutiny. *See* Br. States of Kansas at 7. Adopting the rationale of Justice Scalia in his concurring opinion in *Barnes*, *amici* argue that because the Erie Ordinance applies to public nudity in general, its merely incidental effect on expressive nude dancing does not warrant anything more than an inquiry into whether there is a rational basis for the law. *Id.* at 6-7, 10-11.

This case, however, provides an inappropriate context for even considering such a substantial change in First Amendment jurisprudence. Unlike the statute at issue in *Barnes*, Erie's Ordinance *explicitly targets* expressive activity on its face. Although the Ordinance's substantive provisions purport to apply to public nudity in general, the law's preamble states that the Ordinance was passed in order to suppress nude dancing performances. And, unlike *Barnes*, this is not a case in which a general anti-nudity law "predates barroom nude dancing and was enacted as a general prohibition." 501 U.S. at 568 (plurality opinion); *see also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80-81 (1976) (Powell, J., concurring). To the contrary, the events giving rise to the Ordinance's enactment and the Ordinance itself show that the law was adopted not in order to prohibit nudity, but in order to prohibit nude dancing. As one Erie City Council member confirmed when describing the Council's purpose in adopting the Ordinance, "*[w]e're not prohibiting nudity, we're prohibiting nudity when it's used in*

a lewd and immoral fashion." J.A. at 39 (statement of Councilman Thompson) (emphasis added). At the time of the Ordinance's enactment, the City of Erie apparently had at least two zoning ordinances addressing the permissible locations for "adult entertainment" establishments. *See id.* at 42-43 (statement of Councilman Bagnoni). The transcripts of the City Council meeting concerning the Ordinance show that the Council members were frustrated with the failure of these laws to prevent nude dancing from occurring within the City. *See id.* ("Back in 1977 we introduced an ordinance, and then again we come back in 1985 with an ordinance. If that ordinance would have been supported and enforced, two [nude dancing establishments] wouldn't be in business today . . . .").[3]

The plain language and background of the Ordinance thus demonstrate that the law, though cloaked in terms of a general prohibition on public nudity, has as its direct purpose the restriction of a form of expressive conduct.[4] For that reason, it would blink reality to immunize the Ordinance from

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[3] *See also id.* at 37-38 (statement of Councilwoman Robison) ("My concern is that [the Ordinance] will become just another piece of yellowed paper languishing in an ordinance book like the article it's replacing); *id.* at 40 (statement of Councilman Thompson) (discussing a prior ordinance addressing "lewd entertainment" and the need to "redefine[]" the law to address the City's problem with such entertainment).

[4] Although the illicit motive of some members of a legislative body is not a sufficient basis upon which to invalidate an otherwise constitutional law, *see O'Brien*, 391 U.S. at 383, legislative history is certainly pertinent to the determination of whether a law has as its purpose an unconstitutional goal, *see, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645-49 (1994) (examining statute's text, legislative history, and operation to determine whether the "manifest purpose" of statute is to regulate speech based on its message); *Lukumi*, 508 U.S. at 540 (Kennedy, J., joined by Stevens, J.).

heightened constitutional scrutiny on the theory that it is a generally applicable law aimed at nonexpressive conduct that just happens to affect speech incidentally.[5]

Indeed, both the *amici* attorneys general and Justice Scalia's opinion in *Barnes* acknowledge that where the explicit purpose of a purportedly general law is to restrict free expression, that law must be subject to evaluation under the First Amendment. 501 U.S. at 577; Br. States of Kansas at 8. *Cf. Employment Division, Dep't of Human Resources v. Smith*, 494 U.S. 872, 882 (1990) (applying categorical approach to Oregon's generally applicable drug laws where there was "no contention that Oregon's drug law represents *an attempt to regulate religious beliefs*") (emphasis added). That rule is a necessary correlate of any rule immunizing "generally applicable" laws from heightened constitutional scrutiny — because of the ease with which those who would restrict constitutional rights can do so through laws that appear on their face to be neutral regulations of conduct. *See Lukumi*, 508 U.S. at 531-32.

O'Brien, by contrast, teaches that subjective motivations are irrelevant. 391 U.S. at 383-84. That kind of approach — eschewing efforts to ascertain the actual motives of legislators — can only be maintained if, as *O'Brien* also directed, laws "incidentally" burdening expressive conduct are subjected to heightened scrutiny, regardless of what the court surmises about the reasons why the laws were passed. *Amici* are of the view that this type of approach is far more sensible. But the more important point, for present purposes, is that the choice between the two approaches makes no difference in this case.

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[5] In light of the history of the Ordinance's enactment, the only "incidental" effect of the Ordinance is its burden on *nonexpressive* nudity.

Both approaches would mandate heightened scrutiny here — either because the Erie Ordinance "incidentally" burdens expression or because its purpose was to do so.

That the Ordinance *explicitly* targets a form of expressive conduct ordinarily would require "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Texas v. Johnson*, 491 U.S. 397, 411-12 (1989). Indeed, *amici* believe that, in light of the plain language and history of the Ordinance, strict scrutiny is warranted. Nonetheless, because the Court applied intermediate scrutiny to a similar (albeit distinguishable) law in *Barnes*, and because the Ordinance fails even intermediate scrutiny, this brief will be confined to a discussion of the Ordinance's constitutional infirmities under the *O'Brien* test.

II. THE ERIE ORDINANCE FAILS INTERMEDIATE SCRUTINY.

In *O'Brien*, the Court held that a purportedly neutral law that burdens expressive activity may withstand First Amendment analysis:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. There is apparently no dispute about the proposition that the City of Erie has the power to enact an ordinance of this general type. The key inquiries thus relate to the remaining three parts of the test, which focus on the governmental interest asserted as a justification — whether it

is substantial and actually furthered by the law, whether the interest is unrelated to suppressing speech, and whether there are less restrictive methods of achieving the Government's objectives.

Petitioners advance two alternative interests to support the Ordinance. First, the City argues — and the Ordinance explicitly states — that the law serves the purpose of restricting live nude dancing because of the alleged "secondary effects" associated with this type of expressive conduct. *See* Pet. Br. at 18. Second, Petitioners contend in the alternative that the law is justified by the City's interest in promoting morality by prohibiting "live nude entertainment." *See id.* at 21. Neither rationale is sufficient to uphold the law under *O'Brien*.

A. The City's "Secondary Effects" Rationale Is Insufficient to Withstand Intermediate Scrutiny.

Petitioners principally rely on the "secondary effects" rationale. Following the language of the preamble, petitioners argue that allowing the conduct banned by the Ordinance "adversely impacts and threatens to impact the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects." Pet. App. 7a. They further argue that such interests are sufficient to satisfy *O'Brien*. That argument was accepted by one Justice in *Barnes*, *see* 501 U.S. at 582-87 (Souter, J., concurring), but it does not work.

In pointing to "secondary effects," petitioners attempt to fit this case within the ruling in *Renton*, where the Court upheld a zoning ordinance restricting the location of "adult motion

picture theaters" to certain areas within a city, reasoning that the zoning law "is aimed *not at the content of the films shown* at 'adult motion picture theatres,' *but rather at the secondary effects of such theaters* on the surrounding community." *Renton*, 475 U.S. at 47 (emphasis added). Drawing on the holding in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), that "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations," *Renton*, 475 U.S. at 49, the Court in *Renton* held that the zoning law reasonably regulated the dispersion of those theaters while leaving open sufficient locations in the City for the theaters to present their films, *id.* at 51-53.

But this case is different from *Renton* in ways that are critical to the application of the *O'Brien* test. The law at issue here does not target the *location* of establishments offering erotic entertainment. It seeks instead to impose a particular limitation on the forms of erotic entertainment available in all existing or future establishments, regardless of where located — permitting "live entertainment" in which dancers are partially nude, but proscribing otherwise similar entertainment when performed totally in the nude. Such a law cannot be defended as furthering a substantial interest in reducing "secondary effects."

Furthering a Substantial Governmental Interest Unrelated to the Suppression of Free Expression. The differences between the *Renton* law and the Ordinance at issue here mean there is a serious question whether the Ordinance actually "furthers" a substantial governmental interest "unrelated to the suppression of free expression." There is no doubt that the City's interest in reducing violence, prostitution,

disease and the other so-called "secondary effects" it has identified is substantial and legitimate in the abstract, but when one considers how the law is designed and how it is supposed to achieve its express objectives, the secondary effects rationale cannot serve to justify what the City has done.

Petitioners essentially ask the Court to indulge in one of two assumptions, neither of which is supported by evidence or common sense. The first is the assumption that, as a purely commercial matter, total nudity is so critical to the operation of "adult" establishments that merely by requiring the tiniest amount of covering of the body, the Ordinance will cause such establishments to go out of business, thus reducing the "secondary effects" they allegedly cause. But that rationale is highly questionable both in principle — since it amounts to an explanation that the law was covertly designed to exclude an entire broad category of protected expression — and in practice — since it is undeniable that there are many "adult" establishments that operate with live entertainers who are only partially clad.

The second possible assumption would be that the establishments at issue would indeed continue to operate, but that the scant attire required by the Ordinance would, *by itself*, reduce the amount of violence, prostitution, harassment and sexually transmitted disease in the City of Erie. Here again, there are problems both in principle and in practice.

To the extent petitioners are claiming that nudity in a dancer's act so stimulates the *audience* that it causes members of the audience to engage in violence, hire prostitutes or transmit diseases, it is not appropriate to describe these effects as "secondary." To the contrary, a law seeking to regulate speech in order to suppress the anticipated reactions of the

audience is plainly content-based and thus, unlike the law at issue in *Renton*, cannot be said to be targeting the "secondary effects" of speech or any other interest unrelated to the suppression of free expression. In *Renton,* the Court held that municipalities may constitutionally restrict the *location* of "adult" establishments, without being deemed to have targeted the *content* of the entertainment provided in those businesses. *See Boos*, 485 U.S. at 320 (O'Connor, J., joined by Stevens & Scalia, JJ.) (explaining that in *Renton*, "[t]he content of the films being shown inside the theaters was irrelevant and was not the target of the regulation. Instead, the ordinance was aimed at the 'secondary effects of such theaters in the surrounding community' . . . .") (quoting *Renton*, 475 U.S. at 47). In other words, "[s]o long as the justifications for regulation have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters . . . the regulation [is] properly analyzed as content neutral." *Id.*

By permitting expressive activity that conveys a less sexually charged message, but banning the same form of expression when it is at its most erotic — on the ground that the latter type of expressive conduct creates a certain negative "atmosphere" that the former kind of dancing does not — the City of Erie has crossed an important constitutional line that applies to sexual speech but is not limited to it. As the Court has consistently recognized, the First Amendment forbids governmental restrictions on speech because of the provocative or persuasive effect of that speech on its audience. *See Boos*, 485 U.S. at 321 (O'Connor, J., joined by Stevens & Scalia, JJ.); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Texas v. Johnson*, 491 U.S. at 408-09. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos*, 485 U.S. at 321 (O'Connor, J., joined by Stevens &

Scalia, JJ.). Rather, the interest in protecting against viewer reaction aims at the *primary* effect of nude dancing. *See Reno v. ACLU*, 521 U.S. 844, 868 (1997) ("[T]he purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Boos*, 485 U.S. at 321 (O'Connor, J., joined by Stevens & Scalia, JJ.). A law that targets nude dancing because of its alleged effect on the audience is thus undeniably content-based. *See Forsyth*, 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *see also Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 802 (1996) (Kennedy, J., concurring in part and dissenting in part) ("The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes *or otherwise wishes to exclude on account of its effects*, and there is no justification for anything but strict scrutiny here.") (emphasis added).

In any event, it is implausible to suppose that the addition of small amounts of covering to the acts of the live entertainers in Erie's adult establishments will in fact have a significant impact on the problems supposedly associated with adult establishments. Heightened scrutiny demands more than rank speculation, especially when it is so counterintuitive. If nude dancing gives rise to harmful "secondary effects," logic dictates that dancing with "a scant amount of clothing," *Barnes*, 501 U.S. at 571 (plurality opinion), which also conveys an erotic message (albeit somewhat muted in comparison to totally nude dancing), would result in similar effects. The necessary fit between means and (asserted) ends is simply missing in this case.

Showing that the Burden on Speech is No Greater than is Essential to Further the Government's Objective. Even if petitioners could show that the Ordinance would reduce the so-called "secondary effects" identified by the City in a legitimate content-neutral manner, the law would still run afoul of the final part of the *O'Brien* test. According to the terms of the Ordinance, totally nude dancing may not occur anywhere within the City limits. The Ordinance thus completely bans a particular category of expressive conduct. Such a broad restriction places a greater burden on speech than is essential to attack the problems posited by the City.[6]

Here again, *Renton*, along with this Court's earlier decision in *Young*, is instructive. Although the Court in *Renton* and *Young* approved laws designed to *disperse* adult movie theaters within a community, it did not suggest that the same rationale would justify a total ban. Indeed, the Court cautioned that "[t]he situation would be quite different" if the zoning ordinances at issue "had the effect of suppressing, or greatly restricting access to, lawful speech." *Young*, 427 U.S. at 71 n.35 (plurality opinion). As the Court explained in *Renton*, "the First Amendment requires only that [a city] refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." 475 U.S. at 54.

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[6] In *Barnes*, certain members of the Court concluded that the Indiana statute was not overly restrictive because it permitted *some* erotic dancing to take place. *See* 501 U.S. at 571-72 (plurality opinion); *id.* at 587 (Souter, J., concurring). Although it is true that this Ordinance, like the Indiana statute, does not ban *all* forms of erotic dancing, both laws *completely* ban *one* form of erotic dancing — dancing performed in the nude. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

Other decisions of this Court also emphasize that nude dancing may not be totally banned to achieve the government's objective. Thus, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71 (1981), the Court struck down a zoning ordinance prohibiting any form of "live entertainment" within the Borough. The Court rejected the Borough's argument that the case was controlled by *Young*, stating that in *Young*, "[t]he Court did not imply that a municipality could ban *all adult theaters* — much less all live entertainment or *all nude dancing* — from its commercial districts citywide." *Schad*, 452 U.S. at 71 (emphasis added); *see also LaRue*, 409 U.S. at 118 ("While we agree that at least some of the [nude] performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression, *the critical fact* is that California has not forbidden these performances across the board.") (emphasis added). Indeed, the Court has expressed doubt "that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech." *R.A.V.*, 505 U.S. at 394; *see also Reno v. ACLU*, 521 U.S. at 868 (statute banning all "indecent" and "patently offensive" speech on the Internet is "a content-based blanket restriction on speech" that does not satisfy the *Renton* test).[7]

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[7] Further, the Court has suggested that particularly restrictive zoning, and certainly a total ban on a type of expressive conduct, may give rise to the presumption that the government is attempting to restrict expression on the basis of content. *See Renton*, 475 U.S. at 48 ("As Justice Powell observed in *American Mini Theatres*, '[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'") (quoting *Young*, 427 U.S. at 82 n.4 (Powell, J., concurring)); *Young*, 427 U.S. at 84 (Powell, J., concurring) ("[C]ourts must be alert to the possibility of direct rather than incidental effect of zoning on expression,

By completely prohibiting nude dancing — rather than regulating the time, place, and manner in which it can be performed — the Ordinance is not sufficiently tailored to serve any substantial government interest. Leaving aside zoning measures, there are several other ways in which the City could address problematic "secondary effects" without banning all nude dancing. Among other things, the City could more vigorously enforce laws criminalizing "prostitution and obscene behavior," *Barnes*, 501 U.S. at 594 (White, J., dissenting), and could substantially increase the penalties for those crimes. "Furthermore, if nude dancing in barrooms, as compared with other establishments, is the most worrisome problem," it could impose "appropriate regulation" of nude dancing in that particular setting. *Id.*

In sum, a "secondary effects" rationale is ultimately very ill-suited to the task of justifying the particular Ordinance at issue here.[8]

B. The City's Purported Interest in Promoting Morality Is Also Insufficient.

Petitioners also argue, at least in passing, that the Erie Ordinance is justified by the City's interest in "promot[ing] . . . public . . . morals." Pet. Br. at 22. To serve that interest, petitioners reason, "[t]he individual's right of free expression cannot be given free reign at all times, but must sometimes be subordinated to the general welfare." *Id.* In other words,

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and *especially to the possibility of using the power to zone as a pretext for suppressing expression.*") (emphasis added).

[8] For similar reasons, we respectfully disagree with the rationale of Justice Souter's concurring opinion in *Barnes*.

petitioners assert that the total suppression of nude dancing is justified because of the City's moral objection to such dancing. That line of reasoning, however, is precisely what the First Amendment prohibits.

Petitioners' argument appears to be based on the plurality's rationale in *Barnes*. In *Barnes*, the plurality concluded that the burden placed on nude dancing by Indiana's anti-nudity statute was justified because the state's moral disapproval of public nudity was unrelated to the expressive component of nude dancing. 501 U.S. at 570-71 (plurality opinion). Noting that "[p]ublic indecency statutes of this sort are of ancient origin," the Court reasoned that such statutes "reflect moral disapproval of people appearing in the nude among strangers in public places." *Id.* at 568. Because, according to the plurality, moral opposition to the physical fact of appearing nude in public was the target of the statute, the government's interest was unrelated to the suppression of expression for purposes of the *O'Brien* test. *Id.* ("[W]hile the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.").[9]

The Court should firmly reject the *Barnes* plurality's view that "morality," without more, can justify a law used to ban a

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[9] Without question, even under the plurality's reasoning in *Barnes*, the government cannot directly regulate speech based on a moral disapproval of that speech. *See* 501 U.S. at 569-70 (plurality opinion). This would effectively immunize all laws arising from the majority's "moral" objection to a particular type of speech. But this certainly cannot be the case: the Court has consistently invalidated laws restricting kinds of speech that many would deem "immoral." *See Reno v. ACLU*, 521 U.S. at 874-75 ("indecent" and "patently offensive" speech on the internet); *R.A.V.*, 505 U.S. at 396 ("hate speech" and cross-burning); *United States v. Eichman*, 496 U.S. 310, 318 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. at 418-19 (same).

form of expressive conduct. In reaching this conclusion, the plurality relied upon *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), and *Bowers v. Hardwick*, 478 U.S. 186 (1986); but, as Justice Scalia pointed out in his concurring opinion, in those two cases the Court concluded that the asserted right was *not* entitled to any special constitutional protection and, therefore, the regulation required only a rational basis. *Barnes*, 501 U.S. at 580 (Scalia, J., concurring). Indeed, the Court has never been willing to restrict *a fundamental constitutional right* on the basis of a bare assertion of "morality." To the contrary, resistance to allowing the state's moral judgments to override an individual's liberty must be especially strong when First Amendment rights are implicated. *See Smith*, 494 U.S. at 902 (O'Connor, J., dissenting) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.").[10]

The central purpose of the Free Speech Clause of the First Amendment (and of the religion clauses as well) is to deprive the government, whether acting through raw authoritarian power or as a voice of the majority, of the power to dictate what is "right" in matters of thought or religion.[11] That is why,

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[10] *Cf. Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("'The fact that society may find speech offensive is not a sufficient reason for suppressing it.'") (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)).

[11] *See West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess

in applying the *O'Brien* test, the Government is required to show that a regulation of conduct that incidentally burdens expression furthers a substantial interest unrelated to free expression. In applying that test, the Government should be required to offer something more concrete than a mere assertion that the conduct at issue is deemed by the Government to be "immoral." It should be required to show that restricting the conduct will further some *other* interest, such as protecting people from harm caused by the conduct. A "pure" moral judgment, not based on some more concrete state interest, may be sufficient to justify a regulation of non-expressive conduct. But if *O'Brien* is to retain any meaning whatsoever as a form of heightened scrutiny, that same judgment cannot be used to justify applying the law to burden expressive conduct. After all, *any* regulation of conduct could be so justified, and there would therefore be no case in which intermediate scrutiny ever provided any protection of expressive conduct.

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by word or act their faith therein.").

CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court holding the Ordinance unconstitutional should be affirmed.

Respectfully submitted,

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September 30, 1999

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Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

No. 98-1161

In The

Supreme Court of the United States

THE CITY OF ERIE, PENNSYLVANIA, JOYCE A. SAVOCCHIO, CHRIS E. MARAS, MARIO S. BAGNONI, ROBERT C. BARBENDER, DENISE ROBISON, AND JAMES N. THOMPSON, ALL IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PAP'S A.M., T/D/B/A "KANDYLAND",

Respondent.

On Writ Of Certiorari To The Supreme Court of Pennsylvania

BRIEF OF *AMICI CURIAE* DEJA VU CONSULTING, INC. AND DEJA VU OF NASHVILLE, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Deja Vu Consulting, Inc. is a Michigan corporation that provides consulting services to exotic dance clubs throughout the United States and Canada, and licenses to those facilities the use of certain federally registered copyrights, trademarks, and service marks, including the trade name "Deja Vu." Currently, there are forty-five such businesses across the United States and Canada operating under such names as "Deja Vu," "Dreamgirls," and "Little Darlings." Although utilizing various trade names, *amici* will simply refer to these establishments as "Deja Vu" clubs. Located from the eastern seaboard in Miami Beach to the western reaches of the United States in Hawaii, Deja Vu clubs represent the largest associated group of such businesses in North America. *Amicus* Deja Vu Consulting, Inc. is included here as a representative for all of these facilities. These businesses, and particularly the type of entertainment that they provide, will be significantly affected by the ultimate decision in this case.

Deja Vu of Nashville, Inc. owns and operates one such Deja Vu club. Located in Nashville, Tennessee, this facility has presented nude performance dance entertainment to the consenting adult public since 1989. In 1994, the Tennessee legislature passed a "public indecency" statute (generally referred to as "Ch. 542"), that would arguably preclude the form of entertainment presented at this establishment. While the enforcement of Ch. 542 had been enjoined by the Sixth Circuit for much of the time

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amici curiae* discloses that he authored this brief in whole. Funding for the preparation and submission of this brief was provided exclusively by *amicus* Deja Vu Consulting, Inc. Attorneys for Petitioners and Respondent have consented to the filing of this *amicus curiae* brief. Copies of the written consents are filed contemporaneously herewith.

since its enactment, that court ultimately upheld the constitutionality of the statute on the basis that it complied with Justice Souter's concurring opinion in *Barnes*. Deja Vu of Nashville, Inc. is now a petitioner in this Court in the case of *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, et al.*, No. 98-1935, requesting review of that ruling. The decision here will therefore materially affect Deja Vu of Nashville, Inc. and control any further review of the constitutionality of Ch. 542.

"DEJA VU" AND THE ADULT CABARET INDUSTRY

> "Americans now spend more money at strip clubs than at Broadway, off-Broadway, regional, and non-profit theaters; at the opera, the ballet and jazz and classical music performances – ***combined***."

U.S. News & Report, Feb. 10, 1997, at p. 44 (emphasis added).

These "strip clubs," or "adult cabarets" as they are normally referred to by municipalities in the regulations thereof, generally exist in one of three formats. First, are establishments licensed to serve alcoholic beverages which usually, as a result of state and local laws governing the distribution of intoxicants, only present "topless" dancing. Second, are the businesses that present fully nude performance dance entertainment, but which only serve soft drinks and the like. These non-alcohol establishments are generally referred to in the industry as "juice bars." Third, are the "BYOB" facilities which while not licensed to sell or furnish liquor, permit patrons to bring in their own alcoholic beverages. These are generally referred to as "bottle clubs." Pap's *Kandyland* was such an establishment. *Pap's A.M. v. City of Erie*, 674 A.2d 338, 341 n.2 (Pa. Commw. Ct. 1998).

Primarily, although not exclusively, Deja Vu clubs are non-alcohol facilities that present live fully-nude performance dance entertainment to the consenting adult public. Minors are not allowed in these establishments.

While the Deja Vu clubs represent the largest association of adult cabarets throughout the country, they are merely a small fraction of the overall industry. U.S. News & World Report reported in 1997 that there were then approximately 2,500 of the "major" type of facilities in the country. *U.S. News & World Report*, Feb. 10, 1997, at p. 48. Exotic Dancer Directory, an international directory of adult cabarets (published by E.D. Publications, Inc.; the organization being found at www.exotic-dancer.com), lists over 2,100 such clubs in its 1998-99 directory alone. Scores of talent agencies exist that do nothing but place exotic dancers at clubs around the United States.

Shortly after this Court's opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *USA Today* reported that the exotic dance club industry generated yearly figures of ten million patrons, three billion dollars spent in the upper-end type of facilities, and two billion dollars earned by entertainers. August 12, 1991, at p. B5; March 10, 1992, at p. B8.

The industry holds a national convention every year in Las Vegas hosted by E.D. Publications, Inc., which is known as the Exotic Dancer Expo. This year, the convention – sponsored by Associated Underwriters, Inc., a national insurance underwriter, and Budweiser – was held at Caesar's Palace, and comprised of a trade show with 159 vendors (consisting of such industry suppliers as costuming, club lighting, sound systems, furniture, beverage dispensing equipment, commercial kitchen supplies, business organization software, insurance, talent

agents, and the like); an awards banquet hosted by comedian/movie actor Pauly Shore; and the "finals" of various talent competitions for "exotic dancer of the year."

This industry has moved from the fringes of society to the mainstream of popular entertainment.

SUMMARY OF ARGUMENT

Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), adopting a "secondary effects" analysis in order to determine the constitutionality of anti-nudity regulations, neither represents the constitutional "holding" of that decision (in that it is not the position taken by those Justices who concurred on the "narrowest grounds" pursuant to *Marks v. United States*, 430 U.S. 188 (1977)), nor should it be adopted by this Court as an analytical framework in which to evaluate First Amendment freedoms. Such an approach fails to comport with the limitations of the secondary effects doctrine as set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and with the evidentiary obligations of the government pursuant to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). Specifically, Justice Souter's concurrence fails to comply with the precedent of this Court in regard to content-neutrality analysis; it absolves the government of the evidentiary burden to establish that the law will further an important or substantial governmental interest in a direct and effective way; it attempts to create a delineation between legal and illegal forms of nude performance dance entertainment that not only fails to comport with the prior precedent of this Court but which is unworkable in application; and it fundamentally ignores the basic tenet of the secondary effects doctrine – that

being that the regulated expression may still be presented.

In addition, reversal of the decision of the Pennsylvania Supreme Court will have unintended consequences that well-exemplify that true and substantial governmental interests will not be furthered by permitting the government to ban nude and semi-nude performance dance entertainment performed before a consenting adult audience.

Finally, the ultimate conclusion of the Pennsylvania Supreme Court was correct. The Erie ordinance does not pass constitutional muster under the First Amendment jurisprudence of this Court. It fails to further governmental interests, and it is not narrowly tailored under either the *Barnes* plurality opinion or under Justice Souter's concurrence. The decision of the Pennsylvania Supreme Court should therefore be affirmed.

ARGUMENT

I. JUSTICE SOUTER'S CONCURRING OPINION IN *BARNES* SHOULD NOT BE UTILIZED TO EVALUATE THE CONSTITUTIONALITY OF THE CITY OF ERIE ORDINANCE.

In its briefing to this Court, the City of Erie acknowledges the confusion in the inferior courts as to which opinion represents the constitutional "holding" of *Barnes* (Brief, p. 12), asserts that its ordinance would pass constitutional muster under either the plurality opinion authored by the Chief Justice or under the "secondary effects" concurring opinion of Justice Souter (pp. 17-18), but never ultimately takes a position as to which of the three opinions concurring in the *Barnes* judgment represents the appropriate framework in which to adjudicate these constitutional issues. Rather, the city contends that reversal is mandated by the mere fact that five Justices

concurred that the Indiana statute at issue in *Barnes* was constitutional (pp. 11-12).

Such logic does little, however, to reduce the turmoil in the lower courts – created by the fractured nature of *Barnes* – regarding the appropriate legal analysis that should be used to adjudicate the constitutionality of such laws. The widely conflicting – and in some cases diametrically opposed – decisions in this jurisprudential arena warrant this Court in expounding on its decision in *Barnes* and establishing a clear standard for courts to utilize in evaluating these constitutional issues. In furtherance of that endeavor, *amici curiae* assert that Justice Souter's "secondary effects" concurrence in *Barnes* neither represents the constitutional holding of that decision, nor provides an appropriate constitutional framework in which to evaluate First Amendment rights.

A. JUSTICE SOUTER'S CONCURRENCE IN *BARNES* DOES NOT REPRESENT THE HOLDING OF THAT DECISION.

In *Marks v. United States*, 430 U.S. 188 (1977), this Court held that:

> "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . ' "

Id. at 193, *quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Justice Souter's concurrence in *Barnes* cannot constitute the "narrowest grounds" of the decision because his approach is inapposite to both the plurality opinion authored by the Chief Justice and to Justice Scalia's concurring opinion.

Justice Souter's analysis specifically targets only nudity that he concedes is integrated into expressive conduct; erotic dance performed strictly in "adult" establishments. 501 U.S. 583 (Souter, J., concurring). His contemplated constitutional regulation would neither then apply to, for example, an individual standing naked on a crowded street corner, nor, apparently, to nudity or even nude dancing in certain "theatrical" performances. 501 U.S. 585 n.2 (Souter, J., concurring).

The opinion authored by the Chief Justice and joined in by Justices O'Connor and Kennedy clearly would not permit, however, such targeting. Rather, the plurality rested its decision on the general applicability of the Indiana statute. "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity ***across the board***." *Barnes*, 501 U.S. at 566 (emphasis added). As the plurality observed:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes, and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, ***whether or not it is combined with expressive activity.***"

Id. at 571 (emphasis added). Because of this "content-neutrality," the plurality concluded that the statute was then properly analyzed as a "time, place, or manner" regulation. *Id.* at 566-67.

Justice Souter's concurring opinion also fails to comport with the legitimate *justification* for such a regulation as articulated by the *Barnes* plurality: The protection of societal order and morality. *Barnes*, 501 U.S. at 568-569. As the plurality opinion concludes:

> " . . . [T]he governmental interest served by the text of the prohibition is societal disapproval of

nudity in public places and among strangers. ***The statutory prohibition is not a means to some greater end, but an end in itself.***"

Barnes, 501 U.S. at 571-72 (emphasis added). The "end in itself" is the assurance that public nudity will not occur – anywhere. An "across the board" prohibition as contemplated by the plurality arguably furthers such a moral goal, while a regulation in conformity with Justice Souter's concurrence would permit broad exceptions to the prohibitions, contrary to the very underpinning of the opinion authored by the Chief Justice.[2]

Nor does Justice Souter's concurrence comport with the opinion of Justice Scalia, which also eschewed the targeting of "expressive nudity." *Barnes*, 501 U.S. at 574,

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[2] Allowing adults, and even minors, to view the productions of, for example, "Hair" or "Equus" (as would apparently be permitted pursuant to Justice Souter's approach – *Barnes*, 501 U.S. at 585 n.2), while precluding consenting adults from viewing nude performance dance entertainment at Pap's, establishes any alleged moral basis for the law to be illusory, and otherwise renders such a regulation unconstitutional. *See, e.g., City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994) ("exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place"); and *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-542 (1989) (a law banning First Amendment activity by some but not by others "cannot be defended on the ground that partial prohibitions may effect partial relief"). *See also, Church of Lukumi v. Hialeah*, 508 U.S. 520, 546-47 (1993) (where government "restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law "cannot be regarded as protecting an interest 'of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited' ").

576 (Scalia, J., concurring). Justice Scalia observed that a regulation will be determined to be unconstitutional where the government "prohibits conduct *precisely because of its communicative attributes.*" *Id.* at 577 (emphasis added). In addition, Justice Scalia would not appear to endorse Justice Souter's delineation between permissible and criminal nude dancing. *Id.*, at 574 n.2.

In that Justice Souter's analysis specifically *requires* the targeting of expressive conduct and distinguishing between different forms of expression, his position is then directly contrary to the opinions of all of other Justices concurring in the judgment. Accordingly, his secondary effects analysis cannot represent, under *Marks*, the constitutional holding of this Court in *Barnes*.

B. JUSTICE SOUTER'S SECONDARY EFFECTS APPROACH AS SET FORTH IN HIS *BARNES* CONCURRENCE SHOULD NOT BE UTILIZED BY THIS COURT AS AN ANALYTICAL FRAMEWORK IN WHICH TO EVALUATE THE CONSTITUTIONALITY OF ANTI-NUDITY OR OTHER NON-ZONING REGULATIONS.

Even though Justice Souter's "secondary effects" analysis cannot represent the holding of *Barnes*, it should not be adopted as the analytical framework for evaluating the constitutionality of anti-nudity and other non-zoning regulations, in that it has the ultimate effect of overturning both the constitutional parameters of the secondary effects doctrine as established in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and the evidentiary obligations of the government pursuant

to the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968).[3]

First, Justice Souter's opinion fails to adhere to the limitations of "content-neutrality" analysis as set forth in *Renton*. There, this Court noted that although the ordinance treated theaters that specialized in adult films "differently from other kinds of theaters," it was not "aimed [ ] at the *content* of the films shown." *Renton*, 475 U.S. at 47 (emphasis in original). However, the four member dissent in *Barnes* concluded that "[t]he nudity is itself an expressive component of the dance, not merely incidental 'conduct'," 501 U.S. at 592 (White, J., dissenting), and on this particular point, Justice Souter agreed:

> " . . . When nudity is combined with expressive activity, its stimulative and attractive value certainly can enhance the force of expression, and a dancer's acts in going from clothed to nude, as in a striptease, are ***integrated into the dance and its expressive function.***"

501 U.S. at 581 (Souter, J., concurring) (emphasis added). Therefore, a regulation that is directed at nudity as a component of expression – which would be the case in regard to a law enacted under Justice Souter's approach – is directed at the *content* of the entertainment, and therefore violates the *Renton* concept of content-neutrality.

Nor can Justice Souter's analysis in *Barnes* be reconciled with other decisions of this Court in regard to content-neutrality. Subsequent to both *Barnes* and *Renton*,

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[3] *Amici* do not mean to imply that they concede that such regulations should be evaluated pursuant to intermediate scrutiny. Rather, *amici* are in full agreement with the analysis undertaken by the Pennsylvania Supreme Court, and make these arguments here only to the extent that this Court continues to analyze the constitutionality of such regulations pursuant to the *O'Brien* test.

this Court observed that when analyzing whether regulations impermissibly infringe upon protected expression, courts must not accept at face value the supposed legislative motivation for enacting such laws. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) (regulation neutral on its face may be nevertheless content-based if its "manifest purpose" is to regulate speech because of the message it conveys).

Discriminatory treatment of expression is suspect under the First Amendment, even when the legislature may not necessarily facially intend to suppress certain ideas. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993), *citing Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991). As long as there is facial discrimination of speech and/or expression, the law is then "content-based." *Id.* Thus, differential treatment of expressive nudity, which appears to be required under Justice Souter's approach, renders such a targeted regulation "content-based" by "any common sense understanding of the term. . . . " *Discovery Network*, 507 U.S. at 429. *See also, Metromedia, Inc. v. San Diego*, 453 U.S. 490, 516-17 (1991) (the Court noting that an ordinance that distinguishes in several ways between permissible and impermissible signs at a particular location by reference to their content takes "the regulation out of the domain of time, place, and manner restrictions"); *Church of Lukumi*, 508 U.S. at 536-537 (a "pattern of exemptions" can establish the targeting of First Amendment rights).

In addition, Justice Souter's approach cannot be reconciled with the fundamental limitation of the secondary effects doctrine as expressed by the majority in *Renton*; that being that "adult" entertainment will be permitted to continue, albeit in limited geographic areas. This Court concluded in *Renton* that the First Amendment precluded the municipality from "effectively denying respondents a

reasonable opportunity to open and operate an ***adult*** theater within the city. . . . " 475 U.S. at 54 (emphasis added). Yet, Justice Souter's extension of the secondary effects doctrine would eviscerate this restriction by granting government the right to preclude these types of "adult" businesses by requiring the content of the dance expression to be modified so that it is no longer "adult." *See, e.g.*, 501 U.S. at 586 (Souter, J., concurring) (noting the state's interest in "banning nude dancing").

And, there is nothing in his opinion that would preclude the extension of his secondary effects approach to films, books, and magazines. Government could prohibit nudity in such materials in an effort to ameliorate secondary effects. Yet, if a regulation had the effect of banning "adult" materials altogether, it would certainly otherwise violate the content-neutrality analysis in *Renton*, it would be subject to strict constitutional scrutiny, and it would then be presumed to be unconstitutional. Accordingly, Justice Souter's concurrence in *Barnes* cannot be reconciled with the secondary effects doctrine as annunciated by a majority of this Court in *Renton*.

Second, Justice Souter's extension of the secondary effects doctrine is inconsistent with the evidentiary burdens placed on the government, in intermediate scrutiny analysis, to establish the validity of the regulation. Although he determines that the appropriate criteria to utilize in determining the constitutional protections of nude performance dance entertainment are those contained in the four-part test of *O'Brien* (*Barnes*, 501 U.S. at 582), his subsequent analysis fails to adhere to that standard.

When utilizing intermediate scrutiny, this Court has clearly held that the government bears the burden of establishing that the regulation "furthers" an important or substantial interest, and that the restriction on First

Amendment freedom is "no greater than is ***essential*** to the furtherance of that interest." *Renton*, 475 U.S. at 46-47 (emphasis added); *O'Brien*, 391 U.S. at 377. In order to be able to evaluate these second and fourth prongs of the *O'Brien* test, a court must be presented with a sufficient legislative record which contains evidence "as to how effective or ineffective" the regulation is or might prove to be. *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 760 (1996). Simply put, the challenged regulation must be proven to advance the governmental interest "in a direct and effective way. . . . " *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). This burden is not satisfied by "mere speculation or conjecture," and the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Courts are to carefully analyze these issues rather than merely deferring to the legislature. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508-514, 528-532 (1996) (eight Justices in two opinions rejecting the deference conferred in intermediate scrutiny cases to the legislative branch as expressed in *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344-47 (1986)).

Justice Souter's analysis fails to adhere to these longstanding requirements in numerous regards. Initially, his position fails to take into account the effectiveness of the type of regulation at issue in *Renton* – zoning restrictions – to ameliorate secondary effects. He does not, therefore, require evaluation of whether further legislation (such as the anti-nudity regulation in *Barnes*) is needed or more importantly – in the words of *O'Brien* – is either "necessary" or "essential."

And, Justice Souter's approach is inconsistent with the evidentiary obligations of the government as further clarified in *Renton*. As this Court noted in *Renton*, a

municipality need not conduct new secondary effects studies before enacting legislation "so long as whatever ***evidence*** the City ***relies upon*** is ***reasonably believed to be relevant*** to the problem that the City addresses." 475 U.S. at 51-52 (emphasis added). However, in determining that the Indiana statute at issue in *Barnes* fulfilled the second prong of *O'Brien* by furthering the substantial governmental interest in limiting secondary effects, Justice Souter concluded that he did "not believe that a State is required affirmatively to undertake to litigate ***this issue*** repeatedly in every case." 501 U.S. at 584-85 (emphasis added).

What Justice Souter seems to mean by the phrase "this issue" is simply the connection of secondary effects to "adult" establishments; whatever their kind. Thus, as long as some "studies" might have, at some point, substantiated some type of secondary effects being associated with some type of "adult" business, the government need not establish either that the regulation ***furthers*** an important or substantial governmental interest, or that the infringement on First Amendment freedom is no greater than is ***essential*** to the furtherance of that interest. *O'Brien*, 391 U.S. at 377. Under Justice Souter's opinion, there is therefore under *Renton* no longer a requirement of either "***evidence***" or "reliance" thereon (whether reasonable or not) in order to fulfill the second and fourth prongs of *O'Brien*.

The failure of this approach to adhere to the constitutional principles articulated in *Renton* is highlighted by the fact that Justice Souter does not explain how he believes that requiring dancers to wear pasties and G-strings will eradicate secondary effects.[4] In fact, his

[4] *Cf., Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988, 997-98 (N.D.N.Y. 1997) (in concluding that Justice

opinion does not even express a position as to why or how adult businesses supposedly cause these problems:

> "To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are. It is possible, for example, that the higher incidents of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not."

Barnes, 501 U.S. at 585-86 (Souter, J., concurring).

Yet, this statement exemplifies the lack of a causal nexus between mandating entertainers to wear pasties and G-strings and the amelioration of secondary effects. Requiring entertainers to "cover up" would not logically have an effect of dispersing "crowds of men predisposed" to acts of prostitution and sexual assault. Similarly, if this limited clothing does not modify the content or the force of the expression (501 U.S. at 571 (plurality); 501 U.S. at 587 (Souter, J., concurring)), it is not then apparent why

Souter's concurrence could not be the constitutional holding of *Barnes*, the district court observed that there was no "logical relationship" which existed between the percentage of clothing worn by an entertainer and the occurrence of secondary effects). *Accord, Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12 (S.D. Miss. 1994); and *Pap's A.M. v. City of Erie*, 719 A.2d 273, 280 (Pa. 1998).

clothing would cause any secondary effects to be diminished. And, more importantly, if these problems are associated with the "simple *viewing* of nude bodies," the effect is primary, and not secondary. In such a circumstance, an entirely different constitutional analysis would be necessary.

In *Boos v. Barry*, 485 U.S. 312 (1988), this Court considered the constitutionality of a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring that government into "public odium" or "public disrepute." *Id.* at 315. The government argued that, analogous to *Renton*, the law was content-neutral in that it was directed to remedy a secondary effect; namely, "our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The Court disagreed, finding that such an analysis "misreads *Renton*." *Id.*

> "We spoke in that decision only of *secondary* effects of speech, referring to regulations that apply to a particular category of speech because the ***regulatory targets*** happen to be associated with that type of speech. So long as the justifications for regulation have nothing to do with content, ***i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters,*** we concluded that the regulation was properly analyzed as content-neutral.
>
> ***Regulations that focus on the direct impact of speech on its audience present a different situation. Listener's reactions to speech are not the type of 'secondary effects' we referred to in Renton.*** To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to ***prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.***"

Id. at 320-21 (emphasis in original and added). *See also, Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Because the "emotive impact of speech on its audience is not a 'secondary effect'," and because the code provision there regulated speech due to its "primary impact," it was content-based and therefore subject to strict scrutiny. *Boos*, 485 U.S. at 321.

If the government seeks to suppress expression out of a concern for its "likely communicative impact," such a restriction cannot be "justified without regard to the content of the regulated speech," and is, consequently, not content-neutral. *United States v. Eichman*, 496 U.S. 310, 317-18 (1990); *Texas v. Johnson*, 491 U.S. 397, 410-13 (1989). That a secondary effects analysis is therefore inappropriate here, is illustrated by the following statement of this Court in *Boos:*

> "But while the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech. The ***content*** of the films being shown inside the theaters was ***irrelevant and was not the target of the regulation***. . . . In short, the ordinance in *Renton* did not ***aim*** at the suppression of free expression."

Id. at 320 (emphasis added).

A regulation under Justice Souter's analysis certainly targets "content." It is the dance performance itself which is changed. This is the antithesis of the ordinance in *Renton* which did not proscribe, alter, modify or affect, in any way, shape or form, any aspect of the entertainment at issue.

Third, Justice Souter's analysis impermissibly establishes a delineation between protected and non-protected nude performance dance entertainment. Basically, he holds that the type of nude dancing at issue here and in *Barnes* can be precluded, while "legitimate" nude theatrical dancing cannot. *Barnes*, 501 U.S. at 585 n.2 (Souter, J., concurring). Justice Souter does not, however, specifically articulate how such a distinction is to be made; this approach appears to be incongruous with long-standing precedent of this Court; and actual experience of courts post-*Barnes* establishes that attempts to delineate between protected and unprotected expression in such a fashion are unworkable.

This Court has long-held that it is improper for the government – let alone courts – to attempt to make distinctions as to the value of "speech." In the context of "expression," this concern may have been first addressed by this Court in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), where it was asked to analyze the application of a certain copyright law that only applied to "illustrations or works connected with the *fine arts*." *Id.* at 250 (emphasis added). Confronted then with the question of what constituted the "fine arts,"[5] Justice Holmes, writing for the Court, stated that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations. . . . " *Id.* at 251. Noting that some new forms of expression might be found repulsive and thus denied protection, the Court observed that legal protections:

> " . . . would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any

[5] At issue were pictures of ballet dancers and other performers at a circus (ironically, at that time, ballet was considered a low culture form of popular entertainment).

> public, they have a commercial value, – it would be bold to say that they have not an aesthetic and educational value, – ***and the taste of any public is not to be treated with contempt.***[6] ***It is an ultimate fact for the moment, whatever may be our hopes for a change.***"

Id. at 251-252 (emphasis added).

Similarly, in *Winters v. New York*, 333 U.S. 507 (1948), when dealing with a regulation that prohibited the "massing of stories of bloodshed and lust in such a way to incite to crime against the person," *id.* at 514, this Court held that "though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. *See also, Cohen v. California*, 403 U.S. 15 (1971), where Mr. Justice Harlan, writing on behalf of the Court, observed that while the vulgar expression in question was "more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is larger because governmental officials cannot make principled distinctions in this area that the Constitution leaves matter of taste and style so largely to the individual." *Id.* at 25. And, in regard to the expression at issue here, this Court noted in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), that an entertainment program could not be prohibited "solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Id.* at 66.

[6] This comment should be placed in context with the reference, *supra*, that Americans now spend more money at adult cabarets than at all of the supposed "fine [performance] arts" combined.

The targeting of only one form (or aspect) of nude performance dance entertainment does not then pass constitutional muster under the First Amendment. The State may enact reasonable time, place, and manner regulations applicable to "all speech irrespective of content." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.*

Actual experience by courts in attempting to apply Justice Souter's demarcation of performances at an "adult cabaret" – which may have all of the physical and entertainment attributes of a "legitimate theater" (whatever that phrase may mean) – from permissible nude "theatrical" dancing, has proven the wisdom of the words of this Court referenced above, and illustrates that his secondary effects approach is an unworkable doctrine by which to evaluate the constitutionality of these types of regulations.

Farkas v. Miller, 151 F.3d 900 (8th Cir. 1998), was the Eighth Circuit's foray into *Barnes*. There, the court was confronted with an Iowa statutory amendment that precluded certain forms of nudity not just in alcohol establishments as had been the case in the past, but in all businesses "required to obtain a sales tax permit."[7] *Id.* at 901-02. The Eighth Circuit concluded that the statute passed muster under Justice Souter's concurrence in

[7] The Eighth Circuit never explains how businesses required to obtain a sales tax permit are associated with secondary effects.

Barnes, id. at 904-06, and rejected the plaintiffs' overbreadth challenge because it found that a statutory "theatrical performances" exception[8] "appropriately limits the reach of the restrictions ***to the type of adult entertainment that is associated with harmful secondary effects.***" *Id.* at 905 (emphasis added).

After the decision of the district court (which had also upheld the constitutionality of the statute) but before the circuit court had ruled, Mr. Farkas continued to permit nude dancing at his "adult" establishment and was prosecuted for violating the Iowa statute, as was a gentlemen by the name of Jeffery Marshall. In pre-trial motions, the court ruled in both cases that it was the government's burden to establish that the defendants did ***not*** fall within the "theatrical performances" exception. App. 4-5, 11; 15-16, 19.

Mr. Marshall was acquitted in a bench trial when the court held that the evidence failed to rise to a level from which a rational trier-of-fact could conclude that the adult entertainment establishment at issue there was not a "theater" as that term was used in the statute. App. 20-28. The state then moved to dismiss the charges against Mr. Farkas predicated upon its belief that an acquittal of Mr. Farkas was preordained. App. 29-31. The state court agreed. App. 32.

Thus, even though the Eighth Circuit concluded that the statute was not overbroad because it was limited to Mr. Farkas' type of adult entertainment establishment, the state trial court had already concluded that Mr.

[8] "The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances. . . ." 151 F.3d at 902.

Farkas' business did not, in fact, fall within the purview of the statutory prohibitions. This experience illustrates the impropriety, as recognized by this Court, of attempting to distinguish between various forms of otherwise protected expression,[9] and exemplifies why Justice Souter's secondary effects approach should not be embraced by this Court.

II. THE ULTIMATE CONCLUSION OF THE PENNSYLVANIA SUPREME COURT WAS CORRECT.

The conduct of the City of Erie in deciding not to enforce the challenged ordinance against "theatrical productions" illustrates why the protection of morality, as discussed in the plurality opinion in *Barnes*, is an improper basis for criminalizing expressive activities. Exempting out "legitimate theater" from the prohibitions of these types of regulations well-illustrates the impermissible targeting of this form of entertainment.

In Pennsylvania, there is already an existing state statute similar to the law of general applicability described in the *Barnes* plurality opinion. 18 Pa. Cons. Stat. §5901 (1973), provides that it is a misdemeanor for an individual to commit any lewd act – of which nudity is included – if he or she knows that it is "likely to be observed by others who would be affronted or alarmed."

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[9] *See also, Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978) (the Supreme Judicial Court of Massachusetts observing that requiring the government to distinguish between nudity as it occurs in a work of "artistic and socially redeeming significance" as opposed to "the customary 'bar room' type of nude dancing," would be to make the police and courts "artistic constables" with the job of "evaluating the artistic worth and tasteful quality of the performance in its total context").

This statute applies to exactly the type of conduct discussed in the plurality opinion, as well as the "activities having no communicative element" mentioned in the concurrence of Justice Scalia (*Barnes*, 501 U.S. at 574). Conduct prosecuted under this statute has included masturbation in public (*Commonwealth v. Heinbaugh*, 354 A.2d 244 (1976)), and a nude man who strolled into a public pizza parlor (*Commonwealth v. Anzulewicz*, 42 Pa. D. & C.2d 484 (Q.S. Mont. Cnty. 1967)).

The application of that statute to expressive activity was clarified, however, in *Commonwealth v. Allsup*, 392 A.2d 1309 (Penn. 1978), where the defendant had performed fully nude on a stage. The Pennsylvania Supreme Court unanimously concluded that the statute comes into play "only when the lewd conduct of the defendant occurs in a place and at a time when it is likely to be observed by persons who have not consented to its occurrence, or who have not specially positioned themselves in such a manner as to be able to observe it, and who are likely to be affronted by such conduct or to find such conduct alarming." *Id.* at 1311. Because adult patrons in the bar at issue had paid an admission fee and seemed to regard the performance as "entertainment," this conduct, the court concluded, did not meet the requirements of the statute. *Id.* at 1312.

Accordingly, the Erie ordinance is not narrowly tailored in that its restrictions on First Amendment freedoms (the dancing at Pap's) are greater than ***essential*** to the furtherance of "societal order and morality." The provisions of 18 Pa. Cons. Stat. §5901 (1973) further these substantial governmental concerns, yet cause no damage to constitutionally protected expression being presented before a consenting adult audience. A broader regulation, such as the Erie ordinance, fails "narrow-tailoring." *Ward*,

491 U.S. 799; *Denver Area Educ. Tel.*, 518 U.S. at 755-756. In addition, any contention that the protection of morality constitutes a justifiable basis under the *Barnes* plurality for enacting this ordinance is illusory, in that the City asserts that it currently has no intention of enforcing the regulation against "theatrical productions."

III. THE UNINTENDED CONSEQUENCES OF REVERSAL ESTABLISH THE LACK OF IMPORTANT OR SUBSTANTIAL INTERESTS TO SUSTAIN THE ORDINANCE.

Unlike the zoning decision in *Renton* and the licensing ruling in *FW/PBS*, a reversal here will have the unmistakable effect of changing the nature (and *amici* would argue "content") of the entertainment presented at many facilities across the United States. Entertainers can, and in various areas will, be required to wear at least "pasties and G-strings," and if past precedent has been any indicator, they may be required to adorn far more than that. *See, e.g., Cafe 207 v. St. Johns County*, 856 F. Supp. 641, 646 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) ("it does not seem to me from a constitutional standpoint that a modest increase in the amount of body covering required by the law [over and above the clothing mandated in *Barnes*] really adds any significant, incremental burden on the expressive component of the dance"); *Bright Lights, Inc. v. City of Newport*, 830 F. Supp. 378, 381 (E.D. Ky. 1993) (upholding an ordinance that required entertainers to wear bathing suits). A reversal in this action will then have both the legal and practical result of transforming what the law currently now considers to be (and regulates as) "adult" cabarets into non-adult businesses. This will have at least three profound consequent effects.

First, the zoning of "adult" businesses (including cabarets) is now firmly entrenched in the jurisprudence of this Nation. These regulations tend to parrot the ordinance at issue in *Renton*, which applied only to theaters that presented films depicting "specified sexual activities" or "specified anatomical areas." *Renton*, 475 U.S. at 44. These "specified anatomical areas" are those which are banned by an anti-nudity ordinance such as the one at issue here. A reversal will mean that for those municipalities with anti-nudity regulations, any "adult cabarets" within its borders would no longer be subject to adult use zoning restrictions, since they would no longer present "adult" entertainment.[10] It cannot further an important or substantial interest to render these zoning regulations, which now exist in virtually every jurisdiction, unenforceable against cabarets.

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[10] The question would then be whether the zoning laws that apply to "adult" entertainment facilities could be rewritten to constitutionally apply to "bikini clubs." This raises an interesting analytical dilemma, particularly if this Court is inclined to adopt Justice Souter's "secondary effects" *Barnes* concurrence as the constitutional framework in which to evaluate anti-nudity regulations. To pass muster under the second and fourth prongs of *O'Brien*, the government would have to establish that requiring dancers to "don pasties and G-strings" would reduce secondary effects in a direct and effective way. *Ward*, 491 U.S. at 800. If it does, there is then a proper justification for the law. And, of course, if it does ameliorate perceived secondary effects, there would then be no basis to extend these laws to regulate "bikini clubs." On the other hand, if requiring dancers to "cover up" does not eliminate secondary effects – which would have to be the conclusion as a justification for further regulation of "bikini clubs" (whether by way of zoning, licensing or other means) – there was then no legal basis for the anti-nudity regulation in the first place and it fails to pass muster under *O'Brien*.

Second, the industry, and particularly the "juice bars" (such as most of the Deja Vu clubs) which neither sell nor permit the consumption of alcoholic beverages on the premises, will have to adjust the operation of their businesses in consideration of market forces. With the way that the laws are generally structured today, juice bars can economically exist in competition with alcohol establishments because they can offer a form of entertainment that the liquor facilities cannot legally provide; they can present fully nude entertainment, whereas the alcohol clubs can generally only present topless dancing.

A reversal here will place all three different types of cabarets (alcohol establishments, juice bars, and bottle clubs) on an equal footing in regard to the type of entertainment that they can present. Accordingly, the juice bars will be at a significant economic disadvantage, in that patrons, when confronted with the choice of going to two different establishments to see the same type of entertainment – one that serves alcohol and one that does not – will generally choose the alcohol establishment. This unquestionable reality will require the vast number of juice bars around the country to obtain liquor licenses simply as a matter of economic preservation.

Such a consequent result would seem to be antithetical to the important governmental interests as expressed in prior decisions of this Court, and as understood by way of "common sense" in regard to the general evils of intoxicants. This Court and others have long referred to the negative effect by the combination of alcohol and erotic dancing. *See, e.g., New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) (in upholding a regulation that banned topless dancing in establishments that were licensed to serve alcoholic beverages, the Court cited to the New York State Legislative Annual 150 (1977),

which stated that "[c]ommon sense indicates that any form of ***nudity coupled with alcohol in a public place begets undesirable behavior***") (emphasis added); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96 (1986) (the city commission in the preamble to an ordinance prohibiting nude or nearly nude activity on premises licensed to sell alcoholic beverages had determined that "***nude dancing in establishments serving liquor was 'injurious to the citizens' of the city***") (emphasis added); *Jott, Inc. v. Charter Township of Clinton*, 569 N.W.2d 841, 854-55 (Mich. App. 1997) (regulation banning nudity in establishments that sold alcoholic beverages was constitutional as a measure to "eradicate the effects of 'undesirable behavior' stemming from a ***combination of alcohol and nudity***") (emphasis added); *Lounge Management, Ltd. v. Trenton*, 580 N.W.2d 156, 161-62 (Wis. 1998), *cert. denied*, 119 S.Ct. 511 (1998) (ordinance which prohibited all depictions of nudity – whether live or pictorial – in all business establishments was unconstitutionally overbroad because the regulation had "no connection to the ***potential harmful secondary effects arising from nude dancing in liquor licensed establishments***") (emphasis added). *See, also, California v. La Rue*, 409 U.S. 109, 114, 118 (1972); and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975).

In addition, the general concerns relating to alcoholic beverages alone – drunk driving, unruly customers, illness, and the like – are self-apparent, and have contributed to a large part of this industry voluntarily choosing not to engage in the distribution of intoxicants. These concerns of limiting the distribution of alcohol are, indeed, legitimate, substantial, and important governmental interests. Yet, by reversing the Pennsylvania Supreme Court decision here, this Court would be pushing a large segment of the exotic dance club industry

directly in the opposite direction to a position where they would either have to obtain liquor licenses to ensure economic survival or close their doors because of a lack of customers. Drastically expanding the number of entertainment establishments that sell alcoholic beverages cannot be considered under any analysis, however, to further important governmental concerns.

Under the precedent discussed above, the government has ample authority to regulate problems attendant to the combination of alcohol and exotic dancing. Accordingly, if this Court determines that modification of the decision of the Pennsylvania Supreme Court is warranted, it should merely clarify that states and municipalities are still free to prohibit the presentation of either fully nude or even topless dancing in establishments that dispense intoxicating beverages. By limiting the right of the State to prohibit such entertainment in only establishments that sell alcohol, this Court would serve the governmental interests noted in the decisions previously referenced, and particularly in *La Rue*, while at the same time providing weight and force to its eight Member conclusion in *Barnes* that the type of entertainment at issue here falls within the protections of the First Amendment. Such a limitation is warranted because, after all, this Court in *La Rue* rested its decision (that nude and semi-nude entertainment could be constitutionally prohibited in places that serve intoxicating beverages) on the "***critical fact***" that the State had "***not*** proscribed such performances ***across the board***." *La Rue*, 409 U.S. at 118 (emphasis added).

Third, also entrenched in the jurisprudence of this Nation are statutes in most every state which preclude minors from being given access to live entertainment performances that contain nudity or semi-nudity (topless

females).[11] It is these statutes which preclude minors from gaining access to adult cabarets. The protections as contained in these statutes would be rendered meaningless by a reversal here. Once entertainers can be required to wear the type of clothing that takes their performances out of the purview of the statutes, minors will no longer then be legally precluded from either entering these facilities as patrons or viewing therein the "bikini dancing" that can be permissibly conducted. In addition, without any form of (statutorily defined) "adult" entertainment being displayed, laws that prohibit minors from performing as entertainers in such facilities[12] would be

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[11] Some statutes merely preclude minors in places where nude or semi-nude entertainment is displayed. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3556(A) (West 1989); and Del. Code Ann. tit. 24, §1629(a) (1997), and the definitions of "adult entertainment establishment" as found in §1602(2) and "specified sexual activities" as found in §1602(17)(d). Other statutes involving the display of matter obscene to minors (also and usually defined as being "harmful to minors") require, as a predicate, the presentation of certain forms of nudity. *See, e.g.*, Kan. Stat. Ann. §21-4301c(a)(3) (1995), and the underlying definitions of "harmful to minors" and "nudity" as found in §21-4301c(d)(2) and (5); N.J. Stat. Ann. §2C:34-3(b) (West 1995), and the definitions of "obscene material" and "specified anatomical area" as set forth in §2C:34-3(a)(1) and (3); Ohio Rev. Code Ann. §2907.31(A)(1)-(3) (Anderson 1996), and the definitions of "harmful to juveniles" and "nudity" as set forth in §2907.01(E) and (H); and Vt. Stat. Ann. tit. 13, §2802(b)(1)-(3) (1998), and the definitions of "nudity" and "harmful to minors" as set forth in §2801(2) and (6). Yet, other statutes specifically define an "obscene" or "harmful" performance as to minors simply as one that contains nudity. *See, e.g.*, Or. Rev. Stat. §167.075(1) (1990), and the definitions of an "obscene performance" and of "nudity" as set forth in §167.060(5) and (6).

[12] It is criminal in many jurisdictions for minors to perform as exotic entertainers by exposing genitals and other specifically

unenforceable in regard to clubs required to comply with an anti-nudity regulation. Certainly, no substantial governmental interest would be furthered by these results.

CONCLUSION

For the reasons as set forth herein, the decision of the Pennsylvania Supreme Court should be affirmed.

Respectfully Submitted,

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defined sexual body parts. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3552(A)(2); Ga. Code Ann. §16-12-100(b)(3), and the underlying definition of "sexually explicit conduct" to include the exhibition of the genitals or pubic area as set forth in §16-12-100(a)(4)(D); and Utah Code Ann. §76-5a-3(1)(a) (1995), and the definition of "nude or partially nude" as set forth in §76-5a-2(5). Numerous other states (and the District of Columbia) have similar laws.

APPENDIX

"A"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. JEFF PAUL MARSHALL, Defendant.	)	No. SRCR202583 RULING ON MOTIONS (Filed Apr. 30, 1998)

On April 17, 1998, this matter came before the Court on the defendant's combined pretrial motions filed February 18, 1998. The State was represented by Assistant Scott County Attorney Robert Weinberg. The defendant appeared personally and was represented by Attorney John Moeller. The defendant filed with the Court an exhibit list with accompanying exhibits A-L inclusive. The defendant also filed with the Court a statement of facts believed to be undisputed. Subsequent to the hearing, the State filed with the Court a resistance to the defendant's statement and exhibits, however subsequently counsel for the parties advised the Court that they agreed the Court could consider the defendant's exhibits and statement solely for purposes of the motions, but that the State was not stipulating to the truth of the matters contained therein.

The defendant's combined pretrial motions are really a single motion to dismiss asserting three separate grounds for dismissal: (1) that the statute at issue is invalid as a violation of the single subject requirement of Article III, Section 29 of the Iowa Constitution; (2) that the statute is not applicable to this defendant because the

business at issue is not required to obtain a sales tax permit; and (3) that the statute at issue is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. Also, at the time of the hearing, counsel for the parties made oral motions pursuant to Rule of Evidence 104 to determine which party bears the burden of proof on issues concerning the relevant statute's "sales tax" requirement and exceptions to its application.

The statute in question was enacted as Section 3 of Senate File 503 which subsequently was compiled at Section 3, Chapter 125, 1997 Iowa Acts. That provision amended Section 728.5, Iowa Code (1997), to read as follows:

> "An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:
>
> 1. If such person allows or permits the actual or simulated public performance of any sex act upon or in such place of business.
>
> 2. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.
>
> 3. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

> 4. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.
>
> 5. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.
>
> 6. If such person allows or permits a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons. However, if such person allows or permits a minor to participate in any act included in subsections 1 through 4, the person shall be guilty of an aggravated misdemeanor.
>
> The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances."

The Court finds from its analysis of the statute that the State must prove the following elements to obtain a conviction under the statute:

1. On or about May 9, 1997, the defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa.

2. That at that time, the place of business was required to obtain a sales tax permit.

3. That at that time, the defendant:

a. Allowed or permitted the actual or simulated public performance of any sex act upon or in such place of business; or

b. Allowed or permitted the exposure of the genitals or buttocks or female breasts of any person who acted as a waiter or waitress; or

c. Allowed or permitted the exposure of the genitals or female breast nipple of any person who acted as an entertainer in the place of business; or

d. Allowed or permitted any person to remain in or upon the place of business who exposed to public view the person's genitals, public hair, or anus; or

e. Advertised that the activities set forth in the other subparagraphs herein was allowed or permitted in the place of business; or

f. Allowed or permitted a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons; or

g. Allowed or permitted a minor to participate in any act described in subparagraphs A-D.

Additionally, if substantial evidence appears, whether from the State of [sic] from the defendant, that the place of business is a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances set forth above were permitted or allowed as part of such art exhibits or performances, the State then must prove that the place of business is not such a place. *See, State v. Bowdry*, 337 N.W.

2d 216, 218-19 (Iowa 1993); *State v. Bohi*, 428 N.W. 2d 679, 680 (Iowa App. 1988).

Also relevant on this point is the qualifying phrase contained in the final paragraph of the statute setting forth exceptions to the application of the statute for certain businesses. The statute lists the following specific businesses as being excepted from the application of the statute: "a theater, concert hall, art center, museum." The statute then includes a further exception for a "similar establishment." The statute then sets forth the following qualifying phrase, "which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances." The question arises whether this final qualifying phrase applies only to the exception for "similar establishments" or applies as well to theaters, concert halls, art centers, and museums. In making this determination, the Court notes that a comma is placed after "museum" and before "or similar establishment." The Court further notes that no comma is included after the word establishment and before the beginning of the qualifying phrase. The Court therefore concludes that the qualifying phrase which concludes the statute only applies to the exception for similar establishments and does not apply to the exceptions for theaters, concert halls, art centers, or museums.

Moving to the defendant's motion to dismiss, the Court notes that the Iowa Rules of Criminal Procedure contain three provisions for dismissal of a trial information. *See*, R.Crim.P. 27; R.Crim.P. 10(6)(c); *and* R.Crim.P 10(6)(a). The provisions of R.Crim.P. 27 and R.Crim.P. 10(6)(c) clearly are not applicable to this case. Therefore,

the defendant's motion must be predicated on R.Crim.P. 10(6)(a) which provides, "If it appears from the bill of particulars furnished pursuant to this rule that the particulars stated do not constitution the offense charged in the . . . information or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the Court may and on motion of defendant shall dismiss the . . . information unless the prosecuting attorney shall furnish another bill of particulars which so states the particulars as to cure the defect."

The file does not reflect any motion for bill of particulars or bill of particulars being filed under R.Crim.P. 10(5). The Court notes that the minutes of testimony filed in this case are exceptional for the paucity of information contained therein. From discussions with counsel for the parties, the Court is cognizant that counsel for the State and counsel for the defendant have engaged in ongoing communication concerning the preparation of this case for trial and the presentation of these issues to the Court. The Court will assume for purposes of determining the merits of the defendant's motion to dismiss that the State has provided the defendant with a bill of particulars expanding on the minutes of testimony filed herein on an informal basis. *Cf., State v. Graham*, 291 N.W. 2d 345, 350 (Iowa 1980) (A bill of particulars is a prerequisite to a motion to dismiss under R.Crim.P. 10(6)(a)).

The defendant first argues that Section 3, Chapter 125, 1997 Iowa Acts, is unconstitutional and unenforceable as a violation of Article III, Section 29 of the Iowa Constitution. That constitutional provision states, "Every act shall embrace but one subject, and matters properly

connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Three purposes are served by this constitutional provision. The requirement serves to prevent "log rolling" which involves the combination of unrelated bills so that unfavorable legislation "rides in" with more popular legislation. The provision also facilitates the legislative process by inhibiting surprise or fraud when legislators are uninformed. Finally, the provision makes it easier for the public to be informed of proposed legislation. *State v. Taylor*, 557 N.W. 2d 523, 525 (Iowa 1996); *also State v. Mabry*, 460 N.W. 2d 472 (Iowa 1990).

This provision of the Iowa Constitution sets forth four requirements. First, an act may have only one subject together with matters germane to it. Second, the title of the act must contain the subject matter of the act. Third, any subject not mentioned in the title is invalid. Fourth, an invalid subject in the act does not invalidate the remaining portions that are expressed in the title. *Taylor*, 557 N.W. 2d at 525; *see, Mabry*, 460 N.W. 2d at 474. However, any constitutional defect relating to title or subject matter is cured once a bill is codified. *Mabry*, 460 N.W. 2d at 475. "There is a window of opportunity, however, measured from the date the bill is passed until it is codified, during which a constitutional challenge may lie." *Taylor*, 557 N.W.2d at 526.

The statute at issue in this case became effective upon the Governor's approval of the act. Thus the statute was

effective but not yet codified on the date the defendant is alleged to have violated the act, May 9, 1997. However, the defendant's challenge on this ground was not filed until February 18, 1998. In the interim, the statute was codified as Section 728.5, Iowa Code Supplement (1997). The Court concludes that the defendant's challenge pursuant to Article III, Section 29 of the Iowa Constitution is not timely.

Even if the Court were to hold that the defendant's challenge under Article III, Section 29 of the Iowa Constitution is timely, the Court notes that the statute's title provides, "An act relating to criminal justice, by providing for enhanced punishment for manufacturing methamphetamine in the presence of minors, providing restrictions on public nudity or actual or simulated public performance of sex acts in certain establishments, authorizing probation supervision and revocation by administrative parole and probation judges in the Sixth Judicial District, providing restitution for death of a victim of a crime, and providing penalties and an effective date." Clearly the title of the statute describes the provision of the statue which is at issue in this case. The act therefore does not violate the provision of the constitution which requires that the subject be expressed in the title. The question then is whether the act embraces but one subject with matters germane to it. This Court believes that the defendant seeks too restrictive an interpretation of that requirement. All the provisions named in the title of the act are related to criminal justice. The Court therefore concludes that the statute in question does not violate the single subject requirement of Article III, Section 29 of the Iowa Constitution.

The defendant also asserts that Chapter 125, Section 3, 1997 Iowa Acts violates the First and Fourteenth Amendments to the United States Constitution. Nude dancing, which is purportedly what occurred at the defendant's place of business on the date charged, is expressive conduct protected by the First Amendment. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 2460, 115 L. Ed. 2d 504, 59 USLW 4745 (1991). Whether the statute at issue violates the First Amendment ultimately turns on the choice of the appropriate standard of review. *Cf., Barnes*, 111 S. Ct. at 2475 (White J. dissenting) ("[O]ur cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.").

In making that choice, this Court is bound by the previous published decisions of the Iowa Supreme Court, the Iowa Court of Appeals, United States Supreme Court, the Eighth Circuit Court of Appeals, and the United States District Court for the Southern District of Iowa, if any decisions of such courts are controlling on the issues presented. Therefore, while this Court may find the logic of the *Barnes* dissent to be more compelling, the Court's decision must be bound by the concurring opinion of Justice Souter. *See, Triplett Grille, Inc. v. City of Akron*, 40 F. 3d 129, 134 (Sixth Cir. 1994).

Justice Souter concluded that an Indiana public nudity statute should be reviewed under the analytical framework set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). *Barnes*, 111 S.Ct. at 2468. This Court, like Judge Vietor, in *Farkas v. Miller*, No. 4-97-70357, slip op. at 17-21 (S.D. Iowa Oct. 23,

1997), finds no meaningful legal distinction between the analysis accorded the Indiana statute in *Barnes* and the analysis which should be applied to the statute at issue here.

In applying the *O'Brien* analytical approach to the statute before this Court, the Court concludes, as Judge Vietor did in *Farkas*, that Section 728.5, 1997 Iowa Code Supplement, is not vague or overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

This is not to say that the application of the statute to this defendant for the activities which are alleged to have occurred on the date charged is constitutional. That issue presents a mixed question of law and fact and is dependent on facts which may be adduced only at trial.

The defendant's final ground in support of the motion to dismiss is a claim that the statute, by its limitation to enterprises which are required to have a sales tax permit, is not applicable to the defendant's business. The defendant has provided information to the Court showing that the defendant restructured his business to attempt to eliminate any requirement that the business have a sales tax permit. The defendant also provided evidence that its previous permit had been surrendered and a final tax return filed.

This argument really relates to the question of whether the State will be able to present sufficient evidence to establish the first element of the alleged crime as that element was identified by the Court *supra*. A pretrial motion to dismiss is not available to address that issue. *Graham*, 291 N.W. 2d at 350.

In summary, the State bears the burden of proof on the elements of the charged offense as outlined above, including the burden to prove the exceptions contained in the final paragraph of the statute do not apply if substantial evidence is presented that such exceptions apply to the defendant. The defendant's motion to dismiss must be denied at this time, however the issues related to the constitutionality of the statute as applied and to the applicability of the statute to this defendant may be appropriate to a motion for judgment of acquittal at the close of the State's evidence at trial or at the close of all the evidence at trial.

IT IS THEREFORE ORDERED that the State will be required to prove beyond a reasonable doubt the elements of the charged offense as set forth herein.

IT IS FURTHER ORDERED that the defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that the Clerk shall provide copies of this ruling to counsel for the State and counsel for the defendant.

Dated at Davenport, Iowa, this 30th day of April, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX

"B"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. RONALD G. FARKAS, Defendant.	No. SRCR20870 RULING ON MOTIONS (Filed May 1, 1998)

On April 17, 1998, this matter came before the Court on the defendant's motion to dismiss filed March 4, 1998. The State was represented by Assistant Scott County Attorney Robert Weinberg. The defendant appeared personally and was represented by Attorney David Cunningham. Also, at the time of the hearing, counsel for the parties made oral motions pursuant to Rule of Evidence 104 to determine which party bears the burden of proof on issues concerning the relevant statute's "sales tax" requirement and exceptions to its application.

The statute in question was enacted as Section 3 of Senate File 503 which subsequently was compiled at Section 3, Chapter 125, 1997 Iowa Acts. That provision amended Section 728.5, Iowa Code (1997), to read as follows:

> "An owner, manager, or person who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances:

1. If such person allows or permits the actual or simulated public performance of any sex act upon or in such place of business.

2. If such person allows or permits the exposure of the genitals or buttocks or female breast of any person who acts as a waiter or waitress.

3. If such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

4. If such person allows or permits any person to remain in or upon the place of business who exposes to public view the person's genitals, pubic hair, or anus.

5. If such person advertises that any activity prohibited by this section is allowed or permitted in such place of business.

6. If such person allows or permits a minor to engage in or otherwise perform in a live act intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons. However, if such person allows or permits a minor to participate in any act included in subsections 1 through 4, the person shall be guilty of an aggravated misdemeanor.

The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or

allowed as part of such art exhibits or performances."

The Court finds from its analysis of the statute that the State must prove the following elements to obtain a conviction under the statute:

1. On or about May 9, 1997, the defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa.

2. That at that time, the place of business was required to obtain a sales tax permit.

3. That at that time, the defendant:

a. Allowed or permitted the actual or simulated public performance of any sex act upon or in such place of business; or

b. Allowed or permitted the exposure of the genitals or buttocks or female breasts of any person who acted as a waiter or waitress; or

c. Allowed or permitted the exposure of the genitals or female breast nipple of any person who acted as an entertainer in the place of business; or

d. Allowed or permitted any person to remain in or upon the place of business who exposed to public view the person's genitals, pubic hair, or anus; or

e. Advertised that the activities set forth in the other subparagraphs herein was allowed or permitted in the place of business; or

f. Allowed or permitted a minor to engage in or otherwise perform in a live act intended to arouse or

satisfy the sexual desires or appeal to the prurient interests of patrons; or

g. Allowed or permitted a minor to participate in any act described in subparagraphs A-D.

Additionally, if substantial evidence appears, whether from the State or from the defendant, that the place of business is a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances set forth above were permitted or allowed as part of such art exhibits or performances, the State then must prove that the place of business is not such a place. *See, State v. Bowdry,* 337 N.W. 2d 216, 218-19 (Iowa 1993); *State v. Bohi,* 428 N.W. 2d 679, 680 (Iowa App. 1988).

Also relevant on this point is the qualifying phrase contained in the final paragraph of the statute setting forth exceptions to the application of the statute for certain businesses. The statute lists the following specific businesses as being excepted from the application of the statute: "a theater, concert hall, art center, museum." The statute then includes a further exception for a "similar establishment." The statute then sets forth the following qualifying phrase, "which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances." The question arises whether this final qualifying phrase applies only to the exception for "similar establishments" or applies as well to theaters, concert halls, art centers, and museums. In making this determination, the Court

notes that a comma is placed after "museum" and before "or similar establishment." The Court further notes that no comma is included after the word establishment and before the beginning of the qualifying phrase. The Court therefore concludes that the qualifying phrase which concludes the statute only applies to the exception for similar establishments and does not apply to the exceptions for theaters, concert halls, art centers, or museums.

Moving to the defendant's motion to dismiss, the Court notes that the Iowa Rules of Criminal Procedure contain three provisions for dismissal of a trial information. *See,* R.Crim.P. 27; R.Crim.P. 10(6)(c); *and* R.Crim.P. 10(6)(a). The provisions of R.Crim.P. 27 and R.Crim.P. 10(6)(c) clearly are not applicable to this case. Therefore, the defendant's motion must be predicated on R.Crim.P. 10(6)(a) which provides, "If it appears from the bill of particulars furnished pursuant to this rule that the particulars stated do not constitute the offense charged in the . . . information or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the Court may and on motion of defendant shall dismiss the . . . information unless the prosecuting attorney shall furnish another bill of particulars which so states the particulars as to cure the defect."

The file does not reflect any motion for bill of particulars or bill of particulars being filed under R.Crim.P. 10(5). From discussions with counsel for the parties, the Court is cognizant that counsel for the State and counsel for the defendant have engaged in ongoing communication concerning the preparation of this case for trial and the presentation of these issues to the Court. The Court

will assume for purposes of determining the merits of the defendant's motion to dismiss that the State has provided the defendant with a bill of particulars expanding on the minutes of testimony filed herein on an informal basis. *Cf., State v. Graham,* 291 N.W. 2d 345, 350 (Iowa 1980) (A bill of particulars is a prerequisite to a motion to dismiss under R.Crim.P. 10(6)(a)).

The defendant asserts that Chapter 125, Section 3, 1997 Iowa Acts violates the First and Fourteenth Amendments to the United States Constitution. Nude dancing, which is purportedly what occurred at the defendant's place of business on the date charged, is expressive conduct protected by the First Amendment. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 111 S.Ct. 2456, 2460, 115 L.Ed. 2d 504, 59 USLW 4745 (1991). Whether the statute at issue violates the First Amendment ultimately turns on the choice of the appropriate standard of review. *Cf., Barnes,* 111 S.Ct. at 2475 (White J. dissenting) ("[O]ur cases require us to affirm absent a compelling state interest supporting the statute. Neither the plurality nor the State suggest that the statute could withstand scrutiny under that standard.").

In making that choice, this Court is bound by the previous published decisions of the Iowa Supreme Court, the Iowa Court of Appeals, United States Supreme Court, the Eight Circuit Court of Appeals, and the United States District Court for the Southern District of Iowa, if any decisions of such courts are controlling on the issues presented. Therefore, while this Court may find the logic of the *Barnes* dissent to be more compelling, the Court's decision must be bound by the concurring opinion of

Justice Souter. *See, Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 134 (Sixth Cir. 1994).

Justice Souter concluded that an Indiana public nudity statute should be reviewed under the analytical framework set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed. 2d 672 (1968). *Barnes,* 111 S.Ct. at 2468. This Court, like Judge Vietor, in *Farkas v. Miller,* No. 4-97-70357, slip op. at 17-21 (S.D. Iowa Oct. 23, 1997), finds no meaningful legal distinction between the analysis accorded the Indiana statute in *Barnes* and the analysis which should be applied to the statute at issue here.

In applying the *O'Brien* analytical approach to the statute before this Court, the Court concludes, as Judge Vietor did in *Farkas,* that Section 728.5, 1997 Iowa Code Supplement, is not vague or overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

This is not to say that the application of the statute to this defendant for the activities which are alleged to have occurred on the date charged is constitutional. That issue presents a mixed question of law and fact and is dependent on facts which may be adduced only at trial.

The defendant's other argument in support of the motion to dismiss is that the business of which the defendant is the owner, manager, or person who exercises direct control over is a theater and excepted from the operation of the statute by the statute's final paragraph. The defendant has provided as an exhibit at the hearing a photocopy of a theater license issued by the City of Davenport for the business in question.

This argument really relates to the question of whether the State will be able to present sufficient evidence to establish the last element of the alleged crime as that element was identified by the Court *supra*. A pretrial motion to dismiss is not available to address that issue. *Graham*, 291 N.W. 2d at 350.

In summary, the State bears the burden of proof of the elements of the charged offense as outlined above, including the burden to prove the exceptions contained in the final paragraph of the statute do not apply if substantial evidence is presented that such exceptions apply to the defendant. The defendant's motion to dismiss must be denied at this time, however the issues related to the constitutionality of the statute as applied and to the applicability of the exceptions in the statute to this defendant may be appropriate to a motion for judgment of acquittal at the close of the State's evidence at trial or at the close of all the evidence at trial.

IT IS THEREFORE ORDERED that the State will be required to prove beyond a reasonable doubt the elements of the charged offense as set forth herein.

IT IS FURTHER ORDERED that the defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that the Clerk shall provide copies of this ruling to counsel for the State and counsel for the defendant.

Dated at Davenport, Iowa, this 1st day of May, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX
"C"

IN THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

STATE OF IOWA, Plaintiff, vs. JEFFERY MARSHALL, Defendant.	))))))	Case No. SRCR202583 FINDINGS OF FACT, CONCLUSIONS OF LAW AND VERDICT (Filed May 8, 1998)

On May 4, 1998, this matter came before the Court for trial. The State was represented by Assistant Scott County Attorney Robert E. Weinberg. The Defendant appeared personally and was represented by Attorney John O. Moeller. The Court, having heard the testimony and having reviewed the evidence submitted herein, finds as follows.

The Defendant is charged with the offense of allowing public indecent exposure in violation of Section 728.5, Iowa Code Supplement (1997). The State therefore must prove beyond a reasonable doubt that:

1. On or about May 9, 1997, the Defendant was the owner, manager, or person exercising direct control over a place of business in Scott County, Iowa;

2. That at that time, the place of business was required to obtain a sales tax permit;

3. That at that time, the Defendant allowed or permitted the exposure of the genitals or female breast nipple of a person who acted as an entertainer in the place of business, or allowed or permitted a person to remain in

or upon the place of business who exposed to public view the person's genitals, pubic hair, or anus; and

4. That the place of business is not a theater.

The Court must base its decision solely on the evidence which consists of testimony, exhibits received by the Court and stipulations between the attorneys. The Court makes deductions and reaches conclusions which reason and common sense lead the Court to make in considering the evidence. The Court is not concerned about whether the evidence is direct or circumstantial as the law makes no distinction between the weight which the Court may give to either direct or circumstantial evidence.

The Court decides the facts from the evidence using its observations, common sense and experience. The Court attempts to reconcile any conflicts in the evidence, but if the Court cannot, the Court accepts the evidence it finds more believable. The Court may believe all, part or none of any witness's testimony. In making that determination, the Court considers the reasonableness and consistency of the testimony both internally and with relationship to other evidence which the Court finds credible. The Court also considers whether a witness has made inconsistent statements, and the witness's appearance, conduct, age, intelligence, memory, knowledge of the facts, interest in the trial, motive, candor, bias and prejudice.

Pursuant to R.Crim.P. 18(8), counsel for the Defendant moved for judgment of acquittal at the close of the State's evidence and again at the conclusion of all the evidence. In each instance, the Court reserved its decision

on the motion pursuant to R.Crim.P. 18(8)(b). In making its determination of the Defendant's motion at the close of the State's evidence, the Court must consider whether the State submitted sufficient evidence from which a rational trier of fact could conclude the Defendant to be guilty beyond a reasonable doubt. With respect to the Defendant's motion made at the conclusion of all the evidence, the Court must consider whether from all the evidence submitted, a rational trier of fact could conclude that the Defendant is guilty beyond a reasonable doubt. Therefore the Court must first address the State's evidence alone to determine whether sufficient evidence was presented at that point in the trial from which a rational trier of fact could conclude the Defendant guilty beyond a reasonable doubt.

Viewing the evidence presented by the State in the light most favorable to the State, the Court concludes that on May 9, 1997, the Defendant was the manager or person exercising direct control over a place of business in Scott County, Iowa. The place of business over which the Defendant was the manager or person exercising direct control was the Southern Comfort Free Theater for the Performing Arts as well as a business called North End Storage.

The evidence also establishes that on May 9, 1997, a person who was an entertainer in the Southern Comfort Free Theater for the Performing Arts exposed her genitals and breast nipples while on stage performing her act. Although testimony was presented indicating that another female, who apparently was an entertainer, entered a room in which the sheriff's deputies and the Defendant were present and then disrobed so that she

could inspect her anal and vaginal areas, that person was not acting as an entertainer at that time. Further, such exposure was not to public view as the activity occurred in a separate room from the stage and general public, and the manager and sheriff's deputies do not constitute the public as that term is used in the statute.

The State's evidence also established that the business known as the Southern Comfort Free Theater for the Performing Arts was not engaged in any activity which requires a sales tax permit under Chapter 422, Iowa Code (1997). However, the activities of North End Storage at that time did require a sales tax permit. Although the businesses are adjoining and share common ownership and management, the State did not prove in the presentation of its evidence that the two businesses are but alter egos of the same entity. Thus the State failed to prove that on May 9, 1997, the Southern Comfort Free Theater for the Performing Arts was a place of business required to obtain a sales tax permit, and that was the place of business in which the activities prohibited by the statute occurred.

Based on the foregoing, the Court concludes that it must enter judgment of acquittal in favor of the Defendant as the State failed to present sufficient evidence from which a rational trier of fact could conclude the Defendant guilty beyond a reasonable doubt of the offense charged. This decision normally would conclude the Court's inquiry and decision. However, the Court is cognizant that this Court's decision in the matter is subject to appellate review and such review may be helped by further fact finding by this Court on the evidence presented not only in the State's portion of the trial but

also the evidence presented from witnesses called by the Defendant.

In considering all the evidence presented at trial in this matter, including the evidence adduced from witnesses called by the Defendant, the Court does conclude beyond a reasonable doubt that the Southern Comfort Free Theater for the Performing Arts and North End Storage are so common in identity and purpose as to be considered by the Court as a single business entity. Specifically, both businesses are sole proprietorships owned by the same person. Short of landing a helicopter on the roof of the Southern Comfort Free Theater for the Performing Arts one cannot gain admittance to that facility without traversing the parking lot operated by North End Storage. North End Storage charges $10.00 per person to park a vehicle on that lot or for an individual to cross that lot in order to gain access to the Southern Comfort Free Theater for the Performing Arts.

The testimony of the Defendant and the owner of the businesses clearly established that North End Storage was activated for the sole purpose of providing a subterfuge through which the Southern Comfort Free Theater for the Performing Arts could continue its operation as a facility in which totally nude dancing occurs. Such circumstances are comparable to the subterfuge rejected by the Iowa Supreme Court in *State v. Mabrey*, 244 Iowa 415, 56 N.W.2d 888 (Iowa 1953).

Thus, in considering all the evidence presented at trial, the Court concludes that sufficient evidence was presented from which this Court, as the trier of fact, concludes that the first three elements of the offense have

been established beyond a reasonable doubt. Therefore the Court must determine whether the State established beyond a reasonable doubt that the Southern Comfort Free Theater for the Performing Arts is not a theater as the term "theater" is used in Section 728.5, Iowa Code Supplement (1997).

As this Court previously ruled, if substantial evidence appears, whether from the State or from the Defendant, that the place of business is a theater, the State then must prove beyond a reasonable doubt that the place of business is not a theater. *See State v. Bowdry*, 337 N.W.2d 216, 218-19 (Iowa 1993); *State v. Bohi*, 428 N.W.2d 679, 680 (Iowa App. 1988). The Court also had ruled previous to trial that the State cannot avail itself of the qualifying phrase contained in the last paragraph of the statute, ("which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances"), as the Court determined that the qualifying phrase only applied to the exception for a "similar establishment" and not to the exceptions for "a theater, concert hall, art center, [or] museum."

The term "theater" is not defined by the statute. This Court therefore must ascertain what the legislature meant when it used the word "theater" in the list of businesses to which the statute does not apply. The Court searches "for legislative intent in what the legislature said, not what it might or should have said." *Dolezal v. City of Cedar Rapids*, 326 N.W.2d 355, 359 (Iowa 1982). "Words of a statute are given their plain or ordinary meaning absent legislative definition or particular meaning in the law."

State v. Jones, 524 N.W.2d 172, 174 (Iowa 1994). "Using a dictionary has been recognized as an acceptable method of ascertaining the meaning of statutory language." *Jones*, 524 N.W.2d at 174.

A "theater" has been defined as "a place where plays, operas, films, etc. are presented." *Webster's New World College Dictionary, Third Edition*, at 1386 (1996).

No evidence was presented indicating that any plays, operas, or films are presented at Southern Comfort Free Theater for the Performing Arts. From the evidence, the only activity which occurs at that facility is nude dance. Although the Defendant attempted to introduce evidence concerning dance as an art form, and specifically nude dances as an art form, the State objected to the admission of such evidence. The Court concludes that such evidence is hearsay and the State's objection is sustained.

Irrespective of the evidence proffered by the Defendant on that issue, the Court does conclude that dance, even nude dance, may be an art or one of the arts. *See Webster's New World College Dictionary*, at 77 ("creative work or its principles; a making or doing of things that display form, beauty, and unusual perception; art including painting, sculpture, architecture, music, literature, drama, the dance, etc."). That the dance performed at the Southern Comfort Free Theater for the Performing Arts is not dance as performed at Hancher Auditorium, the Galvin Fine Arts Center, or the Adler Theater is a difference of degree or quality, not a difference of kind.

The Southern Comfort Free Theater for the Performing Arts is a facility for the presentation of a form of art, though certainly not fine art based on the testimony

presented. The facility has a raised stage on which the dancers perform. The stage has specialized lighting consistent with stage lighting found in mainstream theaters such as those listed previously. A separate dressing area is provided for the entertainers before they take the stage. Seating is arranged for the patrons of the business to view the performances.

The Court determines that the evidence when viewed in its entirety fails to rise to the level of sufficient evidence from which a rational trier of fact could conclude that the Southern Comfort Free Theater for the Performing Arts is not a theater as that term is used in Section 728.5, Iowa Code Supplement (1997). Thus, the Court would be required to grant the Defendant's motion for judgment of acquittal made at the conclusion of all the evidence in this case.

Even were the Court to overrule the Defendant's motions for judgment of acquittal made at the conclusion of the State's evidence and again at the conclusion of all the evidence, this Court would conclude the Defendant to be not guilty based on the facts as found by the Court in connection with its determination of the Defendant's motions for judgment of acquittal.

The Defendant also claimed in the motions for judgment of acquittal that Section 728.5, Iowa Code Supplement (1997), violates the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution as applied to the activities conducted at the Southern Comfort Free Theater for the Performing Arts. In light of this Court's determination of the Defendant's motions on the other grounds raised, and in light of this

Court's determination that irrespective of those motions the Court would determine the Defendant to be not guilty as alleged based on the evidence presented, the Court need not address the Defendant's constitutional issues. In any event, the Defendant has not presented evidence from which this Court could determine that the statute as applied violates the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution.

As the United States Supreme Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), indicates, nude dancing is at the outer limit of constitutional protection. This Court makes no determination as to whether the activities at the Southern Comfort Free Theater for the Performing Arts described in the evidence fall within the purview of the First and Fourteenth Amendments to the United States Constitution. What this Court's determination does is establish that the evidence presented in this case failed to establish a violation of Section 728.5, Iowa Code Supplement (1997).

IT IS THEREFORE ORDERED that the Defendant is not guilty.

Dated at Davenport, Iowa, this 8th day of May, 1998.

/s/ Gary D. McKenrick
Gary D. McKenrick
District Associate Judge

APPENDIX

"D"

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

THE STATE OF IOWA, Plaintiff	)	Criminal No. SRCR208701
vs.	)	MOTION TO DISMISS
RONALD FARKAS, Defendant	)	(Filed June 25, 1998)

COMES NOW, the undersigned Prosecuting attorney and moves that the court dismiss this cause in support of its Motion to Dismiss states as follows:

1. The States testimony regarding the elements of the offense are insufficient (Code 306).

2. The State does not have sufficient evidence to prove beyond reasonable doubt that the place of business herein, Tuxedo's Show Club is not a theater as provided by the exception in Iowa Code Section 728.5.

3. The Trial Court ruled in the case of State of Iowa v. Jeffrey Marshall, Case No. SRCR202583, On May 8, 1998, that another establishment offering the same entertainment as Tuxedo's, namely Southern Comfort Free Theater for the Performing Arts, was a theater under the exception of Section 728.5.

4. Performance structures for Tuxedo's Show Club, including two stages with sophisticated, remotely controlled lighting systems, and a separate large dressing room with separate spaces for the entertainers as well as make-up mirrors and tables, is a more elaborate system than found at Southern Comfort Free Theater.

5. The City of Davenport has required Tuxedo's Show Club to purchase both a live entertainment and a theater license, which Tuxedo's Show Club has purchased and posted as required by law in full view of the public (see attached permits). Tuxedo's Show Club has had a live entertainment and theater license on its current establishment since 1995.

6. Section 17.47.020(A)(3) of the City of Davenport ordinances includes an exception clause which parallels the wording of the exception clause in Section 728.5 of the Code of Iowa and states that the regulations for an "adult entertainment business" shall not apply to a theater, see attached ordinance Section.

7. The State of Iowa could not withstand a motion a verdict acquittal under all the foregoing circumstances.

WHEREFORE, the State of Iowa prays for the Court to dismiss this cause in the interest of justice.

Dated this 25th day of June, 1998.

/s/ Illegible
ROBERT E. WEINBERC, SC0005863
Prosecuting Attorney

copies to:
Dave Cunningham
Attorney for Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause:

_ by depositing a copy thereof in the U.S. Mail, postage prepaid, in envelopes addressed to each of the attorneys

of record herein at their respective addresses disclosed on the pleadings, or

_ by depositing a copy thereof in the Office of the Scott County Court Administrator, or

X hand delivered.

on the 25 day of June, 1998.

signed: Illegible

IN THE IOWA DISTRICT COURT
IN AND FOR SCOTT COUNTY

THE STATE OF IOWA, Plaintiff	)	Criminal No. SRCR208701
vs.	)	ORDER TO DISMISS
RONALD FARKAS, Defendant	)	(Filed June 25, 1998)

On this 25 day of June, 1998, for reasons stated in the foregoing motion and in the interest of justice, IT IS ORDERED that the motion is granted and this cause is hereby dismissed.

The Defendant's bail, if any, is exonerated and the costs of this action are

_ Taxed to the Defendant.

X Not to be Assessed.

/s/ Gary D. McKenrick
JUDGE
Seventh Judicial District
of Iowa